Supreme Court, U.S.
FILED

05-296 AUG 15 2005

NO. 05-_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2005

Edwin Gomez and Jonathan S. Londono,
Petitioners,

v.

State of Tennessee,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS ..... App. i

STATE OF TENNESSEE v. EDWIN GOMEZ AND JONATHAN LONDONO
OPINION OF TENNESSEE SUPREME COURT
163 S.W.3d 632 (Tenn. 2005)
(Filed April 15, 2005) ..... App. 1

ORDER OF THE TENNESSEE SUPREME COURT DENYING PETITION FOR REHEARING
(Filed May 18, 2005) ..... App. 141

OPINION OF THE TENNESSEE COURT OF CRIMINAL APPEALS
(Filed February 18, 2004) ..... App. 146

[STATE'S] PETITION FOR REHEARING IN THE TENNESSEE SUPREME COURT ..... App. 227

RELEVANT TENNESSEE STATUTES:

TENNESSEE CODE ANNOTATED
§ 40-35-101 ..... App. 233

TENNESSEE CODE ANNOTATED
§ 40-35-102 ..... App. 233

TENNESSEE CODE ANNOTATED
§ 40-35-103 ..... App. 235

TENNESSEE CODE ANNOTATED
§ 40-35-110 ..... App. 237

TENNESSEE CODE ANNOTATED
§ 40-35-113 ..... App. 238

TENNESSEE CODE ANNOTATED
§ 40-35-114 ..... App. 240

TENNESSEE CODE ANNOTATED
§ 40-35-201 ..... App. 245

TENNESSEE CODE ANNOTATED
§ 40-35-202 ..... App. 246

TENNESSEE CODE ANNOTATED
§ 40-35-203 ..... App. 248

TENNESSEE CODE ANNOTATED
§ 40-35-210 ..... App. 251

TENNESSEE CODE ANNOTATED
§ 40-35-211 ..... App. 257

TENNESSEE CODE ANNOTATED
§ 40-35-401 ..... App. 259

TENNESSEE SENTENCING GRID
CHART ..... App. 262

App. 1

Supreme Court of Tennessee,
at Nashville.
STATE of Tennessee
v.
Edwin GOMEZ and Jonathan S. Londono.

Jan. 4, 2005 Session at Knoxville.
April 15, 2005.
Order Denying Petition for Rehearing May 18, 2005.

Background: Defendants were convicted in a jury trial in the Criminal Court, Davidson County, Cheryl Blackburn, J., of conspiracy to commit aggravated robbery, facilitation of felony murder, facilitation of especially aggravated robbery, and facilitation of aggravated robbery. Defendants appealed. The Court of Criminal Appeals affirmed. Appeal was permitted.

Holdings: On denial of rehearing, the Supreme Court, Frank F. Drowota III, C.J., held that:

(1) plenary retroactive application of new federal constitutional rule, as opposed to plain error review under

new rule, applies only if appellate review was preserved as to the issue in question;

(2) harmless error standard applies, when new federal constitutional rule is applied retroactively;

(3) under plain error standard, one defendant was not entitled to relief as to violation of Confrontation Clause rights under *Crawford*, relating to admission of unavailable accomplice's out-of-court statement;

(4) error was harmless as to *Crawford* error with respect to other defendant; and

(5) Tennessee Criminal Sentencing Reform Act of 1989 does not violate Sixth Amendment right to jury trial on facts, other than prior convictions, which are necessary to support sentence exceeding maximum authorized by facts established by plea of guilty or jury verdict.

Affirmed.

E. Riley Anderson, J., filed an opinion concurring in part and dissenting in part, in which Adolpho A. Birch, Jr., J., joined.

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David A. Collins, Nashville, Tennessee, and James Stafford, Houston, Texas, Attorneys for Appellant, Jonathan S. Londono.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Gordon W. Smith, Associate Solicitor General; Victor S. (Torry) Johnson III, District Attorney General; and Bret Gunn and Roger Moore, Assistant District Attorneys General, for the Appellee, State of Tennessee.

David L. Raybin, Nashville, Tennessee and Wade V. Davies, Knoxville, Tennessee, for Amicus Curiae, The Tennessee Association of Criminal Defense Lawyers.

OPINION

FRANK F. DROWOTA, III, C.J., delivered the opinion of the court, in which JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined. E. RILEY ANDERSON, J., filed a concurring and dissenting opinion, in which ADOLPHO A. BIRCH, JR., J., joined.

We granted this appeal to determine whether the defendants are entitled to relief on their claim that admission of testimony about a co-defendant's oral statement violated their Sixth Amendment right to confrontation and whether the defendants' sentences were imposed in violation of their Sixth Amendment right to trial by jury. We conclude that admission of testimony about a co-defendant's oral statement violated the defendants' Sixth Amendment right to confrontation because the defendants had no prior opportunity to cross-examine the co-defendant. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158

L.Ed.2d 177 (2004). Nevertheless, we conclude that Gomez is not entitled to relief on this claim because he has failed to preserve it for review and has failed to establish the prerequisites for obtaining relief via plain error review. Although Londono preserved the issue for plenary appellate review, we conclude that he is not entitled to relief because the constitutional error is harmless beyond a reasonable doubt. Finally, we conclude that the defendants' sentences were not imposed in violation of their Sixth Amendment right to jury trial. *See United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Thus, the defendants are not entitled to relief on this claim. Accordingly, the judgment of the Court of Criminal Appeals is affirmed.

637 I. Factual Background

On March 16, 1999, Carlyle & Company Jewelers, ("Carlyle & Company"), a retail store located in the Green Hills Mall of Nashville, put on a special one-day "trunk" showing of approximately 100 Rolex watches with an estimated value of $750,000. The sales event had been advertised throughout the Nashville area. The next day, March 17, 1999, security guards Roy Rogers ("Rogers") and Eugene Nagele ("Nagele") arrived at the store shortly before 9:00 a.m. to retrieve and transport the watches to another store in the Nashville area for a similar event. For transport, the watches were stored in metal boxes, which were then stacked onto a luggage cart. Shortly after 9:00 a.m., Rogers and Nagele pushed the luggage cart from the store into the adjoining Green Hills Mall parking garage, where they had parked. Before they arrived at their vehicle, assailants attacked Rogers and Nagele from behind and stole the

watches. [FN1] Nagele testified that he heard the sound of footsteps "rushing" toward him, but before he could turn toward the assailants, he sustained a blow to the back of his head. Before losing consciousness, Nagele heard a gunshot. When he regained consciousness, Nagele heard someone calling for him. Realizing that Rogers had been shot, Nagele rushed to assist him. Twenty-one days later, Rogers died as a result of complications from a single gunshot wound. Although Nagele was unable to identify any of the assailants, he recalled hearing them speaking a language other than English.

FN1. The assailants also stole Nagele's Colt pistol valued at $1,500.

Deborah Sloan ("Sloan") testified that she arrived with her two young children at Green Hills Mall between 9:10 and 9:15 a.m. on March 17, 1999. After parking in the garage adjoining the mall, but before exiting her minivan, Sloan

"heard a bang, a loud bang, and a lot of running and rustling and things like that." Turning toward this noise, Sloan saw one man lying on the ground, a second man "on his hands and knees fac[ing] away from [her]," and three other men "just running around[.]" Two of these men carried away the metal boxes containing the watches, and the third man "lean[ed] over beside the man who was lying on the ground and pick[ed] up a gun." The three men then departed in a "very nice" "deep red" or "purplish-maroon" Chrysler minivan. Sloan described the three men as young, in their "twenties," with "dark skin, dark hair," and "fairly-average height and weight." When shown photographic arrays prior to trial, Sloan identified Edwin Gomez ("Gomez") and Jonathan S. Londono [FN2] ("Londono") (collectively "the defendants") as two of the men she had seen take the boxes and gun and depart in the minivan on March 17, 1999. She again identified Gomez and Londono at trial.

FN2. She also identified co-defendant Bryant Guartos ("Guartos"), who was tried separately and convicted of conspiracy to commit aggravated robbery, felony murder of Rogers, especially aggravated robbery of Rogers, and aggravated robbery of Nagele.

Christina Hudson ("Hudson"), a Carlyle & Company employee, testified that she had arrived and parked in the Green Hills Mall parking garage shortly before 9:00 a.m. on the day of the robbery and shooting. While waiting in her car for a co-worker to arrive, Hudson noticed a dark-skinned male, whom she described as either Hispanic or African-American, enter the passenger side of a purplish-colored minivan. When the man opened the van door, Hudson saw three other men slouched down in the back of the vehicle. ***638** Hudson was unable to identify any of the men in the van.

Barbara Franklin ("Franklin"), also an employee of Carlyle & Company, testified that two Hispanic men had come into the store on the afternoon before the robbery. Franklin recalled that the shorter of the two men had asked many questions about the watches and about which merchandise would remain in the store after the one-day event. This man had "spoke[n] English very haltingly" as if "English [were] not his first language," and the taller man had not spoken at all.[FN3]

FN3. Franklin later identified co-defendant Guartos as the shorter man, but she failed to identify the taller man who had accompanied Guartos.

After hearing news reports about the crime, Michelle Nicholson ("Nicholson") contacted the police and told them that she had noticed a maroon van with Florida license plates traveling toward Nashville on Interstate 40 shortly after 8:00 a.m. on March 17, 1999. Nicholson observed the van

"weaving in and out of traffic" and saw four men seated in the vehicle, all of whom she described as Hispanic with "dark hair." Nicholson recalled that the van later exited Interstate 440 onto Hillsboro Road going toward Green Hills Mall.

Based on Nicholson's tip and information which witnesses and provided at the scene, investigators canvassed hotels and motels along the interstate highways, westbound to the Davidson County line, seeking information concerning Hispanic men traveling in a maroon van. On March 18, 1999, investigators discovered that four Hispanic men, driving a white van and a maroon van, had rented two rooms at the Howard Johnson's Motel at Interstate 40 and Charlotte Pike. Security videotapes from the motel showed two men at the front desk, a maroon van and a white van in the motel parking lot, and persons coming and going from the vans. Although the tapes were not sufficiently clear to identify these persons,

the front desk clerk at the motel identified Londono [FN4] from photographic arrays.

FN4. The clerk also identified Guartos but was unable to identify Gomez.

Investigators obtained additional evidence from the motel rooms. Inside the closet of Room 204, investigators found ammunition consistent with the bullet that struck the victim. Investigators recovered from inside this ammunition box a fingerprint, which later was matched to Londono's right middle finger. Investigators found another fingerprint on the telephone extension in Room 204, which later was matched to Gomez's right middle finger.[FN5] Housekeepers also discovered in Room 204 a seat that had been removed from a 1996 or 1997 Chrysler minivan, and this seat was turned over to police investigators.

FN5. Investigators also discovered Guartos's fingerprint on the telephone inside this room.

Telephone records revealed that a call had been made on March 14, 1999, from the motel to a pay telephone located outside a restaurant "[a]bout a block-and-a-half" down the street from the Green Hills Mall. Another call had been made on March 16, 1999, at 7:10 a.m. from the motel to a pay telephone located inside the mall, directly across from and facing Carlyle & Company. On March 15 and 16, 1999, a calling card had been used to place telephone calls from the motel room and from a Nashville restaurant to two different numbers in Bogota, Columbia. The same calling card was used on the afternoon of March 17, 1999, to place a call from Montgomery, Alabama, to Miami, Florida and was used again on the morning of March 18, 1999, to place a call to *639 Bogota, Colombia from Gomez's home telephone number in Miami, Florida.

Julie Jimenez ("Jimenez"), who had lived with Londono in Miami in the spring of 1999, testified that Londono and

Gomez lived in the same apartment complex and that Gomez visited Londono's apartment daily. Londono told Jimenez that he and Gomez were cousins. Before leaving town for "[s]even or ten days" in the spring of 1999, Londono told Jimenez that he was going somewhere to make some money, but he refused to tell her where he was going. Jimenez recalled that Londono left Miami with Gomez, Bryant Guartos ("Guartos"), Guartos' wife Maria Sierra, and three other Hispanic men whose names Jimenez did not know. The group left Miami in two vehicles, a white van and a maroon van. Shortly before he returned to Miami, Londono telephoned Jimenez, telling her that he had been to Tennessee, that he had Rolex watches, and that he planned to give her a Rolex watch. Jimenez heard Gomez's voice in the background during this conversation.

When Londono returned to Miami, he gave Jimenez some Nashville postcards and a report of the trip. Londono told

Jimenez the group had stolen Rolex watches from a jewelry store in a shopping mall in Tennessee. Londono said the group had drawn their guns and instructed everyone to lie on the floor. When a security guard lying on the floor reached for his gun, Londono kicked the man and grabbed his gun. According to Londono, someone else shot the security guard because the security guard had seen Londono's face.

Jimenez recalled that Londono received his share of the money from the sale of the watches a few days after returning to Miami. On April 4, 1999, Jimenez and Londono used the money for a shopping spree, spending approximately $3,000 cash on furniture, a television, and other items for Londono's apartment. Concerned that someone would be looking for him, Londono insisted that Jimenez purchase everything in her name.

On April 25, 1999, Detective Gerard Starkey of the Miami-Dade Police Department arrested Londono on

unrelated charges. Detective Starkey searched Londono's burgundy van and found a postcard of the Nashville riverfront area. Thereafter, Detective Starkey located Gomez at his apartment in the Fontainebleau Milton complex and arrested him on unrelated charges. Detectives found $19,600 in cash concealed between the kitchen counter and the dishwasher in Gomez's apartment. Detectives also discovered a furniture receipt for $570, dated March 25, 1999, and three money transfer receipts, evidencing money transfers totaling $6,000 from Gomez and his roommate to persons in Bogota, Columbia. The telephone numbers of the persons to whom the money had been sent matched the telephone numbers to which calls had been placed from the motel and restaurant in Nashville. Two of the money transfers occurred on March 23, 1999. The date on the third receipt was indiscernible.

Detectives from Nashville questioned Londono and Gomez in Miami about their involvement in the March 17,

1999, robbery and shooting at Green Hills Mall. Both men denied ever being in Nashville. These detectives also interviewed Guartos in Miami, and he confessed to his involvement in the crime, providing an oral statement. Guartos later denied making this statement. However, at the Gomez-Londono trial, the detectives were allowed to testify about what Guartos said to them about the crime. Detective Harold Haney testified as follows:

[Guartos] stated that he and others were in Nashville. They used two rented ***640** vans which they got from someone in Miami. One was a wine colored or red. [sic] The other was white. They stayed at the Howard Johnson Motel and used two rooms. He and a woman took the seat out of the white van at the motel because they needed more room. He stated that they got two-hundred-thirty-thousand dollars ($230,000.00) for the watches from the robbery and he used

his share of forty-thousand dollars ($40,000.00) to buy his home in Miami.[FN6]

FN6. Detective Norris Tarkington summarized Guartos' statement as follows:

[Guartos] stated that he and the others were in Nashville. They stayed at the Howard Johnson's and they ... came to Nashville in two rented vans. One was a wine color or red color and the other one was white, and they took the seat out of one of the vans because they needed more room, and he stated they sold the watches for two-hundred-thirty-thousand dollars ($230,000.00) in Miami, and his proceeds from that, his take of that was forty-thousand dollars ($40,000.00).

Gomez and Londono were indicted and tried on the following charges: Count I, conspiracy to commit aggravated robbery; Count II, felony murder of Rogers; Count III, especially aggravated robbery of Rogers; and Count IV, aggravated robbery of Nagele. The jury convicted the

defendants of conspiracy, as charged in Count I. As to each of the remaining charges, the jury found the defendants guilty of the following lesser-included offenses: facilitation of felony murder, facilitation of especially aggravated robbery, and facilitation of aggravated robbery. The defendants each received the maximum sentence within the range for each conviction: six years for conspiracy, twenty-five years for facilitation of felony murder, twelve years for facilitation of especially aggravated robbery, and six years for facilitation of aggravated robbery. The trial judge ordered consecutive service of the sentences for an effective forty-nine year sentence.

Gomez and Londono appealed, and the Court of Criminal Appeals affirmed the judgment of the trial court. Thereafter, this Court granted the defendants' applications for permission to appeal.

II. *Admission of Guartos' Statement*

A. *Crawford v. Washington*

As noted previously, Guartos, who had been separately tried and convicted before the Gomez-Londono trial, provided an oral statement to the police regarding the crime. Because Guartos invoked his Fifth Amendment privilege against self-incrimination at the Gomez-Londono trial, the prosecution sought to admit testimony as to his statement under the hearsay exception for statements against penal interest. *See* Tenn. R. Evid. 804(b)(3) [FN7]. Londono objected, arguing that admitting the statement would violate his Sixth Amendment right to confront Guartos. Gomez also initially objected to the statement's admission, ***641** but he withdrew the objection after the prosecution agreed not to seek admission of a certain part of the oral statement. After confirming that Gomez had withdrawn his objection, the trial court carefully considered Londono's objection. Ultimately,

the trial court allowed the detectives to testify about interviewing Guartos and to testify about his oral statement, but the detectives did not testify about the portion to which Gomez had objected. Detective Haney testified as follows:

FN7. Rule 804(b)(3) provides, in pertinent part:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Rule 804(a) delineates the situations in which a declarant is "unavailable as a witness." The defendants have never contended that the trial court erred by finding Guartos unavailable as a witness for purposes of Rule 804(b)(3).

[Guartos] stated that he and others were in Nashville. They used two rented vans which they got from someone in Miami. One was a wine colored or red. [sic] The other was white. They stayed at the Howard Johnson Motel and used two rooms. He and a woman took the seat out of the white van at the motel because they needed more room. He stated that they got two-hundred-thirty-thousand dollars ($230,000.00) for the watches from the robbery and he used his share of forty-thousand dollars ($40,000.00) to buy his home in Miami.

Immediately after each detective testified, the trial court provided a cautionary instruction, which limited jury consideration of Guartos' statement to the issue of whether

the conspiracy charged in Count I existed. The cautionary instruction expressly forbade jury consideration of Guartos' statement as to Gomez's and Londono's participation in the conspiracy.

Both in his motion for new trial and on appeal to the Court of Criminal Appeals, Londono challenged the trial court's ruling as violative of his Sixth Amendment right to confront the witnesses against him. The intermediate appellate court applied *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *abrogated by Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), *the then-controlling precedent for analyzing challenges based on the Confrontation Clause. In Roberts,* the United States Supreme Court held that out-of-court statements made by a nontestifying declarant are constitutionally admissible against an accused at trial only if the prosecution demonstrates that the declarant is unavailable

and establishes either that the statements fall within a firmly-rooted hearsay exception or that the statements possess "particularized guarantees of trustworthiness." *Id.* at 66, 100 S.Ct. 2531. Applying this test, the Court of Criminal Appeals concluded that the trial court had properly admitted testimony summarizing Guartos' oral statement. Although it did not fall within a firmly-rooted exception to the hearsay rule, the Court of Criminal Appeals concluded that the testimony "was nonetheless supported by sufficient guarantees of trustworthiness" to justify its admission. In an opinion filed February 18, 2004, the Court of Criminal Appeals thus rejected Londono's Sixth Amendment claim.

Less than one month later, however, the United States Supreme Court rendered its decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which abrogated the two-prong test of *Roberts*. The Court in *Crawford* held that "testimonial" out-of-court

statements by a nontestifying declarant may be admitted only if the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 124 S.Ct. at 1374. The *Crawford* Court declared cross-examination to be the "constitutionally prescribed method of assessing reliability" of testimonial statements in criminal trials. *Id.* at 1370. Upon surveying the historical record, the Court derived "two inferences about the meaning of the Sixth Amendment." *Id.* at 1363. "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, ***642** and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 1365. The Court concluded by reiterating its holding:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 1374 (footnote omitted). The Court used "the term 'interrogation' in its colloquial, rather than any technical legal [ ] sense" and explained that a "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Id.* at 1365 n. 4.

Relying upon *Crawford*, both Londono and Gomez now argue that the introduction of Guartos' statement violated their Sixth Amendment right of confrontation. The State

acknowledges that, had *Crawford* been decided prior to the Gomez-Londono trial, Guartos' statement would have been inadmissible; nonetheless, the State asserts that the defendants are not now entitled to relief on this basis. In particular, the State argues that Gomez either affirmatively waived or procedurally forfeited plenary appellate review of this issue. As to Londono, the State asserts that any error was harmless beyond a reasonable doubt.

[1] We begin by accepting the State's concession that *Crawford* would have precluded admission of Guartos' statement had *Crawford* governed the trial court's analysis of this issue. The statement, a product of police interrogation, qualifies as "testimonial" evidence, and the defendants had no prior opportunity to cross-examine Guartos. Thus, were Gomez and Londono tried today, *Crawford* would bar admission of Guartos' statement. What is not clear, however,

is whether *Crawford* entitles Gomez or Londono to relief in this appeal.

B. *Griffith v. Kentucky*

[2] The answer to this question begins with *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). In *Griffith*, the United States Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final...." *Griffith*, 479 U.S. at 328, 107 S.Ct. 708. By abrogating the two-prong test of *Roberts* and reshaping the analysis courts must apply when evaluating the admissibility of evidence under the Confrontation Clause, *Crawford* announced a new rule within the meaning of *Griffith*. *See Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) *("[T]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision...."); see also State v. Dedman*, 136 N.M.

561, 102 P.3d 628, 636 (2004) *(recognizing *643 that Crawford* announced a new rule); *Commonwealth v. Gray*, 867 A.2d 560, 574 (Pa.Super.2005) (recognizing that *Crawford* announced a new rule insofar as it overruled *Ohio v. Roberts*). Furthermore, this appeal qualifies as a case "pending on direct review" at the time *Crawford* announced the new rule. At first glance, then, *Griffith* would seem to require us to apply the *Crawford* rule in this appeal, without regard to whether the issue has been preserved for review. Closer analysis reveals, however, that *Griffith* mandates plenary retroactive application of new rules to cases pending on direct review only if a defendant has timely raised and properly preserved the issue to which the new rule relates.

In mid-1985 the defendants in *Griffith* petitioned the Supreme Court for certiorari while their convictions were still pending on direct review. *Griffith*, 479 U.S. at 318, 107 S.Ct. 708. On April 30, 1986, while the *Griffith* petition was

pending, the United States Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Griffith*, 479 U.S. at 318, 107 S.Ct. 708. In *Batson*, the Court rejected a portion of the reasoning of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In particular, the Court rejected *Swain* to the extent that it had defined a prima facie case in the context of discriminatory selection of the jury venire as requiring proof that the prosecution had in a series of cases repeatedly exercised peremptory challenges to strike black jurors. *Batson*, 476 U.S. at 96-100, 106 S.Ct. 1712. Abrogating this requirement, the *Batson* Court concluded that to establish a prima facie case a defendant need only show that the prosecution had used peremptory challenges to strike members of the defendant's race from the venire in the defendant's case. *Id.* at 93, 96-97, 106 S.Ct. 1712.

On June 2, 1986, the Supreme Court granted certiorari in *Griffith* on the limited issue of whether *Batson* could be applied retroactively to cases on direct appeal. *Griffith*, 479 U.S. at 320, 107 S.Ct. 708. In *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), *partially abrogated by Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 *L.Ed.2d 649 (1987), the Court had held that a new rule of criminal procedure constituting a "clear break" with past precedent was not to be applied retroactively to cases pending on direct review. Because Batson* had been a clear break with *Swain*,[FN8] its retroactive application to direct review cases was foreclosed by *Johnson*. *Griffith*, 479 U.S. at 326, 107 S.Ct. 708.

FN8. *See Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986).

Notably, each of the Griffith defendants had objected prior to *Batson* in the trial court to the prosecutor's racially

discriminatory exercise of peremptory challenges. Furthermore, the *Griffith* defendants had preserved their objections at each stage of their direct appeals, even though they clearly had failed to satisfy *Swain's* prima facie showing requirement. *Griffith*, 479 U.S. at 316-20, 107 S.Ct. 708 (discussing procedural history of the two cases under review). Not surprisingly, the *Griffith* defendants lost at every stage because every court applied *Swain* and held the defense proof of discrimination inadequate. *Griffith*, 479 U.S. at 316-22, 107 S.Ct. 708. Nonetheless, the *Griffith* defendants continued to press and to preserve their claims that the prosecutor had exercised peremptory challenges in a racially discriminatory manner.

Perseverance paid off for the *Griffith* defendants when the United States Supreme Court granted their certiorari petitions, ***644** discarded *Johnson's* "clear break" rule, and applied *Batson* retroactively to their appeal. *Griffith*, 479

U.S. at 326-28, 107 S.Ct. 708. Citing fairness considerations for defendants "similarly situated" to Batson, the Supreme Court reversed the *Griffith* defendants' convictions. Like the defendant in *Batson*, the *Griffith* defendants had properly presented and tenaciously preserved their constitutional challenge at trial and on appeal. Importantly, the *Griffith* defendants had raised and preserved this issue before the Supreme Court decided *Batson*, and had done so in the face of controlling precedent unfavorable to their position.

[3] Having thus reviewed its factual and procedural background, we conclude that *Griffith* does not mandate plenary retroactive application of new rules to pending direct review cases without regard to whether the claim of error has been properly preserved. Instead, *Griffith* simply overruled precedent which had precluded retroactive application of new rules to pending direct review cases.[FN9] Where, *645 as here, a new rule is announced while a criminal case is

pending on direct review, *Griffith* mandates plenary application of the new rule only if the issue to which the new rule relates has been timely raised and properly preserved. A criminal defendant who has failed to properly preserve the relevant issue is limited to seeking relief via plain error review.

FN9. Our reading of *Griffith* is supported by a more recent case which recognizes the important distinction between issues that have been preserved and issues which have not been preserved. The issue in *United States v. Cotton,* 535 U.S. 625, 627, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), was "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court." Relying on *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Cotton argued that his sentence should

be vacated because the enhancing fact had been neither alleged in the indictment nor submitted to the jury. *Cotton*, 535 U.S. at 629-30, 122 S.Ct. 1781. Reviewing his claim for plain error, the Court affirmed Cotton's sentence, explaining that "[t]he real threat ... to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [Cotton], despite the overwhelming and uncontroverted evidence that [he had been] involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial." *Id.* at 634, 122 S.Ct. 1781 (citing *Johnson*, 520 U.S. at 470, 117 S.Ct. 1544).

While not controlling the proper application of new federal constitutional rules, we note that this Court has regularly limited retroactive application of new rules to only those cases pending on direct review in which the issue has been timely raised and properly preserved. *See, e.g., Hill v.*

City of Germantown, 31 S.W.3d 234 (Tenn.2000); *Alcazar v. Hayes*, 982 S.W.2d 845 (Tenn.1998); *City of White House v. Whitley*, 979 S.W.2d 262 (Tenn.1998); *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891 (Tenn.1996); *Perez v. McConkey*, 872 S.W.2d 897 (Tenn.1994); *Broadwell ex rel. Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn.1994); *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 846 S.W.2d 810 (Tenn.1993); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn.1992); *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn.1992). *Adams v. State*, 547 S.W.2d 553 (Tenn.1977); *Farris v. State*, 535 S.W.2d 608 (Tenn.1976).

Despite the dissent's assertions to the contrary, *Farris* and *Adams* are excellent illustrations of this regular practice. *Farris* involved several defendants, but, in the trial court, Mr. Farris had challenged only the first paragraph of a statute which, in other sections, required jury instructions on parole eligibility. Although this Court ultimately invalidated that

portion of the statute which required jury instructions on parole eligibility, the statutory provision Mr. Farris had challenged remained valid after this Court's decision. After this Court denied Mr. Farris relief, he filed a petition to rehear, arguing that he had timely raised and properly preserved his constitutional challenge. This Court denied rehearing, explaining, "[t]his Court operates on the basis of errors assigned for our consideration and we have neither the disposition nor the duty to search the record and decide cases and controversies on the basis of unassigned error." 535 S.W.2d at 622. In *Adams*, 547 S.W.2d at 556, the defendant challenged the constitutionality of the relevant statutory provision, but he did not base his challenge upon the constitutional ground that had garnered a majority in *Farris*. Instead, Mr. Adams argued that the statute was unconstitutionally vague, a constitutional challenge which in *Farris* Chief Justice Fones and Justice Henry found to have

merit. This Court held that by challenging the constitutionality of the relevant statute, *Adams* had sufficiently preserved the issue, even though he had not raised the precise ground upon which the majority in *Farris* rested its decision. In so holding, the Court applied *Farris* "to those cases wherein the conviction has not become final and where appropriate assignments have been made." *Id.* Like Mr. Adams, Londono is entitled to full plenary review of his Confrontation Clause claim because he timely raised and properly preserved his constitutional challenge to the admission of Guartos' statement. On the other hand, Gomez failed to mount a constitutional challenge to the admission of Guartos' statement; thus, he is only entitled to plain error review on this issue.

[4] Furthermore, even those criminal defendants who properly preserve such issues are not automatically entitled to relief. After the United States Supreme Court concluded in

Shea v. Louisiana, 470 U.S. 51, 59, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985), that the new rule which it had announced in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), applied to cases pending on direct review, the Court explained that retroactive application of the new rule was "subject, of course, to established principles of waiver, harmless error, and the like." *Shea*, 470 U.S. at 58 n. 4, 105 S.Ct. 1065. Thus, a defendant may be entitled to plenary appellate review but not be entitled to relief on his claim.

C. *Plain Error Review–Gomez*

[5] Gomez initially objected to the statement's introduction, but his objection was not based on the Sixth Amendment. Guartos told the police that the group had "used two rented vans which they got from someone in Miami for twenty-five-hundred dollars ($2,500.00)," and Gomez objected to allowing the detectives to testify about the amount

paid for the rented van, in particular, the words "for twenty-five-hundred dollars ($2,500.00)." The prosecution agreed not to introduce testimony about this portion of the oral statement. In responding to questions from the trial court, Gomez confirmed that his objection had been limited as described above and also confirmed that his objection was withdrawn in light of the prosecution's willingness not to introduce that testimony. Gomez did not challenge the statement's admission in his motion for new trial or in his appeal to the Court of Criminal Appeals. Having failed to preserve the issue in the courts below, Gomez is limited in this Court to seeking relief via plain error review.

[6][7][8][9] Rule 52(b) of the Tennessee Rules of Criminal Procedure provides that "[a]n error which has affected *the substantial rights of an accused* may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the

appellate court where necessary to do substantial justice." (emphasis added); *see also* Tenn. R.App. P. 36(b) ("A final judgment ... shall not be set aside unless, considering the whole record, *error involving a substantial right* more probably than not affected the judgment or would result in prejudice to the judicial process.") (emphasis added). Plain error review extends only to a clear, conspicuous, or obvious error which affects the substantial rights of the defendant. *646*United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (analyzing the substantially similar Federal Rule of Criminal Procedure 52(b)). Whether an error is "plain" or "obvious" is determined by reference to the law existing as of the time of appellate consideration. *Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). Moreover, relief is warranted only if the plain error prejudiced the defendant by affecting the outcome of the trial court proceedings. *Id.* at 732-37, 113

S.Ct. 1770; *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn.2005). Although very similar to harmless error analysis, plain error review places on the defendant the burden of persuasion, whereas the State bears the burden of persuasion when an appellate court conducts a harmless error analysis. *Olano*, 507 U.S. at 732-37, 113 S.Ct. 1770.

[10][11] The substantive standards for plain error review are difficult to satisfy. An appellate court will reverse for plain error only if:

> (a) the record ... clearly establish[es] what occurred in the trial court;
> (b) a clear and unequivocal rule of law [has] been breached;
> (c) a substantial right of the accused [has] been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn.2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn.Crim.App.1994)). All five factors must be established,

and an appellate court need not consider all five factors if any one factor indicates that relief is not warranted. *Smith*, 24 S.W.3d at 283.

[12] Consideration of factor (d) indicates that Gomez is not entitled to relief. The record clearly establishes what occurred in the trial court: Gomez withdrew his objection to Guartos' statement, and he did so for tactical reasons.[FN10] Here, Gomez did not simply fail to object. Instead Gomez objected to testimony indicating that the group had rented the vans for $2,500 from a person in Miami. Gomez withdrew his objection when the prosecution agreed not to elicit such testimony. The information about the price paid for the rental van did not directly implicate Gomez. Nevertheless, this information, considered in conjunction with the receipt police found in Gomez's apartment for a $2,500 money transfer from Gomez's roommate in Miami to an individual in Bogota, Columbia, reveals the tactical nature of Gomez's objection

and his willingness to withdraw it. Having failed to satisfy *at least* one of the plain error review factors, Gomez is not entitled to relief on this claim.

FN10. As the State points out, the United States Supreme Court has drawn a distinction between "forfeiture" and "waiver."

Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." Whether a particular right is waivable ... [and] whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

Olano, 507 U.S. at 733, 113 S.Ct. 1770 (citations omitted). Although it is debatable whether Gomez's action constitutes waiver or merely forfeiture, we need not discuss this distinction here. Assuming that the plain error standard

applies, Gomez is nonetheless ineligible for relief for the reasons herein explained.

D. *Harmless Error Analysis or Structural Error-- Londono*

As previously noted, Londono has consistently argued that the admission of testimony ***647** about Guartos' statement violated his Sixth Amendment right to confront the witnesses against him. He has preserved the issue to which *Crawford's* new rule relates and is entitled to plenary appellate review of this issue. The State concedes, and we agree, that admitting testimony summarizing Guartos' "testimonial" statement violated the rule announced in *Crawford* because Londono had no prior opportunity to cross-examine Guartos. Having found that Londono's constitutional right to confront Guartos was violated, the next question is whether his conviction must be reversed because of this error.

[13] To answer this question, we must first determine whether *Crawford* errors are structural errors that defy harmless error analysis or are instead trial errors that are subject to harmless error analysis. The historical development of the harmless error doctrine and its general application to constitutional errors has been thoroughly documented by this Court. *See, e.g., Momon v. State,* 18 S.W.3d 152 (Tenn.1999); *State v. Williams,* 977 S.W.2d 101, 104 (Tenn.1998). Significant to this case is the established principle that only a very limited class of "structural defects" require automatic reversal. Momon, 18 S.W.3d at 165-66. Such errors deprive defendants of basic protections and compromise the integrity of the trial process itself. Id. at 165; *see also Johnson,* 520 U.S. at 468-69, 117 S.Ct. 1544 (citing examples of cases involving structural error, including *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction);

Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) *(denial of public trial); Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) *(racial discrimination in selection of grand jury); McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) *(denial of self-representation at trial); Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) *(complete denial of the assistance of counsel); Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge)).

[14][15] The United States Supreme Court and this Court have held that violations of the Confrontation Clause are subject to harmless error review. See, e.g., Coy v. Iowa, 487 U.S. 1012, 1021, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (holding that denial of face-to-face confrontation is subject to harmless error analysis); Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("[W]e hold

that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis."); *State v. Sayles,* 49 S.W.3d 275, 280-81 (Tenn.2001); *State v. Howell,* 868 S.W.2d 238, 253 (Tenn.1993). *Crawford* does not suggest otherwise. Those justices--including Justice Scalia, the author of the *Crawford* opinion--who disagreed with the Court's pre-*Crawford* conclusion in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), that the admission of an accomplice's confession did not violate the Confrontation Clause, nonetheless concurred in the judgment because they believed that harmless error review applied to the perceived violation. *See Lilly,* 527 U.S. at 143, 119 S.Ct. 1887 *(Scalia, J., concurring in part and concurring in the judgment) (stating that admission of accomplice's statement against defendant violated Confrontation Clause, but that case should*

be remanded for harmless-error review); id. at 148, 119 S.Ct. 1887 *(Rehnquist, C.J., concurring in the judgment, joined by O'Connor and Kennedy, JJ.), see also id.* at 143, 119 S.Ct. 1887 *(Thomas, J., concurring in part and concurring in the judgment) (*648 joining plurality in remanding for harmless error review).* Although *Crawford* preserves a criminal defendant's constitutional right to confront adverse witnesses, evidence admitted in violation of *Crawford* is an error in the trial process and not a defect affecting the framework within which the trial proceeds. *Johnson,* 520 U.S. at 468, 117 S.Ct. 1544. Thus, like other Confrontation Clause violations, we conclude that a *Crawford* error is subject to harmless error analysis and does not constitute structural error requiring automatic reversal.

[16][17] Furthermore, we conclude that the *Crawford* error in this case is harmless beyond a reasonable doubt. Guartos' statement did not directly implicate Londono or

Gomez. Immediately after each detective testified about the statement, the trial court provided a cautionary instruction to the jury, limiting the jury's consideration of the testimony about the statement to the issue of whether the conspiracy existed and forbidding its consideration as to whether a particular defendant joined in the charged conspiracy. Jurors are presumed to follow the instructions of the trial court. *State v. Robinson*, 146 S.W.3d 469, 494 (Tenn.2004). Moreover, the other properly-admitted evidence of guilt was substantial. An eyewitness, Sloan, identified Londono from a photographic array and again at trial, testifying that she was "very sure" of the identification. Fingerprint evidence placed Londono at the motel room where various other incriminating items were found linking Londono to the crime. Londono's girlfriend, Jimenez, with whom he had lived in Miami at the time of the crime, testified extensively about Londono's involvement in the crime and about how they spent

Londono's share of the money from the crime. Accordingly, in light of the vague nature of the statement, the trial court's limiting instruction, and the other substantial evidence of guilt, we conclude that the error in admitting testimony about Guartos' statement was harmless beyond a reasonable doubt.

III. *Sentencing Issues*

Gomez and Londono have asserted in this Court that their sentences were imposed in a manner that violated their Sixth Amendment right to a trial by jury.[FN11] In particular, the defendants complain that enhancement factors found by a judge by a preponderance of the evidence were used to impose maximum sentences for each of their convictions. Relying upon the United States Supreme Court's decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the defendants assert that they were constitutionally entitled to receive the presumptive minimum

sentence as defined in Tennessee Code Annotated section 40-35-210(c) (2003).

FN11. Neither defendant contends that the imposition of consecutive sentences violated their right to a jury trial.

A. *Plenary Versus Plain Error Review*

[18] The defendants did not raise this constitutional challenge at their April 4, 2002, sentencing hearing or in their motions for new trial, nor did they raise it in the Court of Criminal Appeals. The defendants first raised this constitutional challenge in this Court.[FN12] The State initially argues that, by failing to raise this issue in the courts below, the defendants have forfeited plenary appellate review and are now limited to seeking relief via *649 plain error review. The defendants counter that *Blakely*, decided on June 24, 2004, announced a new rule and that they mounted their constitutional challenge as soon as possible after *Blakely* was decided. [FN13] The defendants maintain that penalizing

them for failing to raise the constitutional issue sooner would be inappropriate in light of this Court's decision in *Graham v. State*, 90 S.W.3d 687 (Tenn.2002). In *Graham*, we rejected a constitutional challenge similar to the one now under consideration, holding that the Sixth Amendment does not preclude trial judges from finding enhancement factors by a preponderance of the evidence and from considering such factors when selecting the appropriate sentence within a statutory range. *Id.* at 692. The defendants contend that because *Graham* had rejected such a constitutional challenge, their failure to raise earlier and preserve properly the constitutional challenge they now bring is excusable. However, we find each of the defendants' arguments unpersuasive and conclude that plain error review applies to their Sixth Amendment challenge.

FN12. Gomez raised the issue by filing a supplement to his application for permission to appeal. Londono has included a discussion of this issue in his initial brief.

FN13. This Court has endeavored to resolve expeditiously the important issues presented in this appeal. As stated above, *Blakely* was issued on June 24, 2004. On August 2, 2004, the United States Supreme Court granted certiorari in *United States v. Booker,* 04-104 and *United States v. Fanfan,* 04-105. On September 2, 2004, Gomez filed a motion to supplement authorities, relying upon *Blakely.* On October 4, 2004, the United States Supreme Court heard argument in *Booker* and *Fanfan.* Also on October 4, 2004, this Court granted the defendants' applications for permission to appeal and expedited these Nashville cases for hearing in Knoxville during the January 2005 court session. This Court heard oral argument on January 4, 2005, and the United States Supreme Court issued its decision in *Booker* and *Fanfan* on January

12, 2005. Gomez, Londono, and the State were then given until February 14, 2005 to file supplemental briefs addressing *Booker,* and until February 24, 2005 to file replies to these supplemental briefs.

First, we are of the opinion that *Blakely* did not announce a new rule. Admittedly, the United States Supreme Court has not squarely addressed this issue. However, the Court has suggested that *Blakely* was applying a previously recognized principle of law, rather than announcing a new rule. For example, in *United States v. Booker,* --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the Court at the outset refers to "our *Apprendi* line of cases," making it clear that *Apprendi,* not *Blakely,* established the operative rule of law. *Booker,* 125 S.Ct. at 747. Furthermore, the Court in *Booker* expressly confirmed that the result which the majority reached in *Blakely* had been dictated by precedent, stating, "[f]or reasons explained in *Jones v. [United States,* 526 U.S. 227, 119 S.Ct.

1215, 143 L.Ed.2d 311 (1999)], *Apprendi,* and *Ring v.* [*Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)], the requirements of the Sixth Amendment were clear. The application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." *Booker,* 125 S.Ct. at 749 (quoting *Blakely,* 124 S.Ct. at 2536). The Court in *Booker* concluded: Accordingly, we reaffirm our holding in *Apprendi:* Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Booker, 125 S.Ct. at 756. Thus, the language of *Booker* demonstrates that the United States Supreme Court does not regard *Blakely* as having announced a new ***650** rule of

law.[FN14] *See also Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348 *(describing its holding as "foreshadowed by" Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)*); Blakely,* 124 S.Ct. at 2536 *(applying "the rule [we] expressed in Apprendi* ").

FN14. The dissent asserts that *Blakely* must have announced a new rule because "*Booker,* which was merely an application of *Blakely,* stated a new rule...." In our view, the new rule of *Booker* was the Court's holding that the Federal Sentencing Guidelines violated the Sixth Amendment, the Court's excision of the mandatory portions of the Guidelines, and the Court's application of the excised Guidelines. *See Humphress v. United States,* 398 F.3d 855, 861 (6th Cir.2005). The Sixth Amendment principle necessitating the Court's holding was not new and was the same principle discussed in *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311

(1999) *and clearly "expressed in Apprendi."* *Blakely*, 124 S.Ct. at 2536.

Although some other courts and jurists have concluded that *Blakely* announced a new rule, the United States Supreme Court is the final arbiter of this issue. *Cf. Beard v. Banks*, 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) *(reversing the federal circuit court of appeals and holding that Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) announced a new rule). In our view, United States Supreme Court decisions provide authoritative insight on how this question ultimately will be answered. Having carefully considered these authorities, we conclude that *Blakely* did not announce a new rule.

[19] Nonetheless, even had *Blakely* announced a new rule of law, our conclusion that the defendants are not entitled to plenary appellate review of this issue would have been the same. As previously explained, *Griffith* mandates plenary

review in direct review, "pipeline" cases only if the issue to which the new rule relates has been preserved for review. 479 U.S. at 328, 107 S.Ct. 708. Neither Gomez nor Londono preserved a Sixth Amendment challenge to the imposition of their sentences. This constitutional challenge was raised for the first time in this Court after *Blakely* was decided. Thus, the defendants are limited to seeking relief on their Sixth Amendment claim via plain error review. *See Booker,* 125 S.Ct. at 769 *("[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test."); Cotton,* 535 U.S. at 627, 122 S.Ct. 1781 *(applying plain error review to an alleged Apprendi* error that had not been raised in the district court).

Although the defendants are correct in pointing out that we rejected a similar constitutional challenge in *Graham,* this fact does not excuse the defendants' failure to raise their Sixth

Amendment claim. To the contrary, *Graham* illustrates that Tennessee defendants could have asserted *Blakely*-type challenges long before the United States Supreme Court decided *Blakely*. To the extent that the defendants are suggesting that *Graham* deterred them from raising their Sixth Amendment claim, they are factually mistaken because *Graham* was released seven months *after* the defendants were sentenced and six months *after* the trial court denied the defendants' motions requesting a new trial.

[20] Furthermore, had *Graham* been released before the defendants were sentenced, our conclusion would be the same. At the risk of stating the obvious, this Court is not the final arbiter of the United States Constitution. *See, e.g., Seals v. State*, 23 S.W.3d 272, 277 (Tenn.2000) *(noting that this Court is the final arbiter of* ***651** *the Tennessee Constitution, not the United States Constitution)*. Like all Tennessee courts, this Court is bound by the United States Supreme

Court's interpretation of the United States Constitution.[FN15] Defendants dissatisfied with this Court's interpretation of the United States Constitution can and often do seek review in the United States Supreme Court. *See, e.g., Rogers v. Tennessee,* 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001); *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Because such review is available, criminal defendants routinely raise and preserve for federal review issues this Court has previously rejected. *See, e.g., State v. Dellinger,* 79 S.W.3d 458, 472 (Tenn.2002) *("We have repeatedly rejected this argument in prior cases and decline to revisit the issue here."); Harris v. State,* 947 S.W.2d 156, 176 (Tenn.Crim.App.1996) *("The appellant raises numerous constitutional challenges to Tennessee's death penalty statute ... in order to preserve the issues for later review by the federal appellate courts.")*

FN15. *See, e.g., State v. Carruthers,* 35 S.W.3d 516, 561 (Tenn.2000); *Strouth v. State,* 999 S.W.2d 759, 765 n. 9 (Tenn.1999); *State v. McKay,* 680 S.W.2d 447, 450 (Tenn.1984).

[21][22] Moreover, nothing in our decision in *Graham* precluded the defendants from raising *Blakely*-type challenges in future cases. Admittedly, *Graham's* existence meant that such claims would likely have been unsuccessful, but the defendants could have raised and preserved such issues for review by this Court and by the United States Supreme Court. Indeed, a defendant is never precluded from raising an issue simply because a prior decision has rejected it. As our previous discussion of *Griffith* makes clear, courts often reconsider arguments that have been previously rejected. *See also Engle v. Isaac,* 456 U.S. 107, 130, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) *("Even a state court that has previously rejected a constitutional argument may decide, upon*

reflection, that the contention is valid."). Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) *well illustrates this point. In Ring,* the Court overruled *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring,* 536 U.S. at 609, 122 S.Ct. 2428. The defendant in *Ring* preserved his argument under *Apprendi* even though that very argument appeared to be foreclosed by *Walton.* Adverse precedent neither bars a defendant from raising and preserving an issue for review nor excuses a defendant's failure to do so. Thus, because the defendants failed to raise and to preserve for review their Sixth Amendment challenge, the defendants are limited to seeking relief via plain error review.[FN16]

FN16. Limiting the defendants to seeking relief via plain error review, rather than affording them plenary appellate

review, is not at all dependent upon our view that *Blakely* did not announce a new rule. Defendants ordinarily are not entitled to plenary appellate review unless claims have been timely raised and properly preserved. Likewise, a defendant is not entitled to plenary appellate review of a claim based upon a new rule unless the defendant has timely raised and properly preserved the issue to which the new rule relates. The dissent's quarrel with our application of this rule to the defendants' *Blakely* claim is curious, given the dissenting justices' concurrence with our application of this rule to Gomez's *Crawford* claim. On the one hand, the dissenting justices conclude that plenary appellate review applies to the defendants' unpreserved Sixth Amendment claims because *Blakely* announced a new rule; on the other hand, the dissenting justices conclude that plain error review applies to Gomez's unpreserved Confrontation Clause claim, which is based upon the new rule announced in *Crawford*. The

dissenting justices thus express fundamentally inconsistent conclusions as to the review which courts should apply to unpreserved claims which are based upon new rules.

Furthermore, as a practical matter, defendants raising *Blakely* claims are not entitled to relief, regardless of whether plenary or plain error review is applied. As hereinafter explained, the Tennessee Criminal Sentencing Reform Act does not authorize a sentencing procedure which violates the Sixth Amendment right to jury trial. We recognize that some defendants will choose to raise and to pursue Sixth Amendment *Blakely*-type claims in the hope that the United States Supreme Court will ultimately disagree with our determination of this issue, and nothing in this decision precludes them from doing so.

Finally, we are constrained to point out that, in addition to being irrelevant in this direct review appeal, the dissent's suggestion that a petitioner will be able to rely upon *Blakely*

as a ground for reopening a post-conviction petition under Tennessee Code Annotated section 40-30- 117(a)(1), is erroneous. Reopening is appropriate under section -117(a)(1), "[i]f the claim is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." As to whether "retrospective application ... is required," Tennessee Code Annotated section 40-30-122 provides that:

> [a] new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

This standard would not permit, much less require, *Blakely's* retroactive application in a post-conviction proceeding. Indeed, applying a standard virtually identical to section -122, the United States Supreme Court has already

concluded that the new rule announced in *Ring* requiring jury findings of aggravating circumstances in capital cases does not qualify for retroactive application to sentences that were final before *Ring* was decided. *See Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) *(concluding that Ring* announced a new rule by overruling *Walton,* but, applying a standard virtually identical to section -122, refusing to apply *Ring* retroactively to cases already final). Given the Court's holding in *Schriro,* there is no reason to believe that *Blakely* would be afforded retroactive application to final convictions should the United States Supreme Court ultimately conclude that *Blakely* announced a new rule. *See United States v. Price,* 400 F.3d 844, 849 (10th Cir.2005) *(concluding that Blakelys20* announced a new rule but that the new rule does not apply retroactively); *cf. Humphress,* 398 F.3d at 862-63 *(concluding that the new rule announced in Booker* does not apply retroactively to

convictions already final); *Varela v. United States*, 400 F.3d 864 (11th Cir.2005) (same). Thus, seeking reopening under section -117 based on *Blakely* would be a futile endeavor. Conspicuously absent from the dissenting opinion is any authority supporting the dissent's assertion that this Court may retroactively apply a federal constitutional rule which the United States Supreme Court has refused to apply retroactively.

652 B. *Plain Error Review–The Record on Appeal

As previously explained, this Court will reverse for plain error only if

> (a) the record ... clearly establish[es] what occurred in the trial court;
> (b) a clear and unequivocal rule of law [has] been breached;
> (c) a substantial right of the accused [has] been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is "necessary to do substantial justice."

Smith, 24 S.W.3d at 282 (quoting *Adkisson,* 899 S.W.2d at 641-42). An appellate court need not consider all five factors if consideration of any one factor indicates that relief is not warranted. *Smith,* 24 S.W.3d at 283.

In this case, factor (a) is satisfied. The record clearly establishes what occurred in the trial court. Gomez and Londono were convicted of: (1) conspiracy to commit aggravated robbery, a Class C felony which carries a three to six year sentence; (2) ***653** facilitation of felony murder, a Class A felony, which carries a fifteen to twenty-five year sentence; (3) facilitation of especially aggravated robbery, a Class B felony, which carries an eight to twelve year sentence; and (4) facilitation of aggravated robbery, a Class C felony, which carries a three to six year sentence. The trial court found and applied two enhancement factors as to all four convictions: "[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those

necessary to establish the appropriate range;" and "[t]he defendant was a leader in the commission of the offense involving two (2) or more criminal actors." Tenn.Code Ann. § 40-35-114(2), (3) (2003). As to the defendants' conviction for facilitation of felony murder, the trial court applied an additional enhancement factor--"[t]he defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense." *Id.* at (10). As to each defendant and all convictions, the trial judge imposed the maximum sentence within the range: (1) six years for conspiracy to commit aggravated robbery; (2) twenty-five years for facilitation of felony murder; (3) twelve years for facilitation of especially aggravated robbery; and (4) six years for facilitation of aggravated robbery. The trial court stated that, in selecting the maximum sentence as the appropriate sentence, it had afforded "great weight" to the first factor, the defendants' previous history of criminal

convictions. At the time of the sentencing hearing, Gomez had been convicted of "Theft from Interstate Shipment, April 14, 1999, United States District Court, Northern District of Texas, Fort Worth Division," and Londono had been convicted of "Manslaughter, April 12, 2000, Houston, Texas Criminal Court."

C. Plain Error Review--Violation of a Clear and Unequivocal Rule of Law

Having determined that the record clearly establishes what occurred in the trial court, we must next determine whether the defendants' sentences were imposed in violation of a "clear and unequivocal rule of law." As previously explained, plain error review extends only to clear, conspicuous, or obvious error. *Olano,* 507 U.S. at 732, 113 S.Ct. 1770.[FN17] Whether an error is ***654** "plain" or "obvious" is determined by reference to the law existing as of the time of appellate consideration. *Johnson,* 520 U.S. at 468, 117 S.Ct. 1544.

FN17. The dissent faults us for creating what the dissent terms "a new course" by which "all decisions are now retroactive, whether they constitute a new constitutional rule or not. The only question is whether or not the defendant properly preserved the issue, entitling him to plenary review, or whether the defendant failed to preserve the issue, entitling him only to plain error review." This course is not new. As explained in section II. B of this opinion, as to direct review cases, the only relevant question since *Griffith* is whether the defendant is entitled to plenary appellate review or plain error review. New rules apply to cases pending on direct review when the new rule is announced. However, like other unpreserved claims of error, when a defendant fails to raise and to preserve the claim to which the new rule relates, the defendant is limited to seeking relief via plain error review. *Johnson v. United States, supra,* is an excellent illustration of this principle. *Johnson* involved a federal perjury prosecution

in which the element of materiality had been decided by the judge rather than submitted to the jury. The defendant failed to object to this procedure at trial because "near-uniform precedent both from this Court [the United States Supreme Court] and the Court of Appeals" had held that the element of materiality could be decided by the judge. *Johnson*, 520 U.S. at 468, 117 S.Ct. 1544. After Johnson had been convicted, but before her appeal became final, the United States Supreme Court decided *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), which held that materiality of a statement must be submitted to the jury rather than decided by the trial judge. Johnson argued on appeal that the failure to submit materiality to the jury rendered her conviction invalid under *Gaudin*. The Eleventh Circuit Court of Appeals reviewed Johnson's unpreserved claim for plain error and denied relief. The United States Supreme Court affirmed. In doing so, the Court first acknowledged that

Gaudinn had announced a new rule and that under *Griffith* the new rule applied to Johnson's direct review case. *Johnson*, 520 U.S. at 467, 117 S.Ct. 1544. Nevertheless, the Court reviewed Johnson's unpreserved claim for plain error and denied relief. In applying plain error review, the Court explained that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that an error be 'plain' at the time of appellate consideration." *Johnson*, 520 U.S. at 468, 117 S.Ct. 1544. Thus, *Johnson* supports our conclusion that the relevant question is whether a defendant has preserved a claim of error, regardless of whether the claim is based upon a new rule or upon authority existing at the time of trial. Simply put, plain error review applies to all unpreserved claims of error, regardless of whether such claims are based upon new rules. That the dissent fails to grasp these aspects of plain error review is troubling, particularly in light of the fact that the

dissenting justices concurred in section II. B of this opinion, which includes a detailed discussion of plain error review and the analysis which it entails.

Although this Court has not previously addressed the constitutional claim raised by the defendants, in many decisions addressing this issue, the Court of Criminal Appeals has concluded that Tennessee's sentencing procedures violate the Sixth Amendment right to jury trial as explained in *Blakely*. In this appeal the State agrees with the defendants that the presumptive sentence established by Tennessee Code Annotated section 40-35-210(c) (2003) is the maximum sentence which a judge can constitutionally impose because, in the State's view, the presumptive sentence is the only sentence authorized by the jury verdict. Moreover, because the trial judge in this case found enhancement factors (other than the fact of the defendants' prior convictions) and selected a sentence other than the presumptive sentence, the State

concedes that the defendants' sentences were imposed in violation of the Sixth Amendment right to a jury trial. According to the State, the validity and correctness of its concession is supported by the United States Supreme Court's decision in *Booker*.

[23][24][25] Before accepting a concession, this Court independently analyzes the underlying legal issue to determine whether the concession reflects a correct interpretation of the law. *See, e.g., State v. Ely,* 48 S.W.3d 710, 716 n. 3 (Tenn.2001); *State v. Ducker,* 27 S.W.3d 889, 893 n. 1 (Tenn.2000); *State v. Shepherd,* 902 S.W.2d 895, 906 (Tenn.1995). Where, as here, a concession casts constitutional doubt upon a duly enacted statute, such an independent analysis is crucial. In conducting this analysis, we are mindful that statutes are presumed to be constitutional. *See Gallaher v. Elam,* 104 S.W.3d 455, 459 (Tenn.2003); *State v. Robinson,* 29 S.W.3d 476, 479 (Tenn.2000); *Riggs*

v. Burson, 941 S.W.2d 44, 51 (Tenn.1997). Indeed, we must "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn.2002); *see also Riggs*, 941 S.W.2d at 51; *In re Burson*, 909 S.W.2d 768, 775 (Tenn.1995).

Thus, we must conduct an independent analysis to determine whether the sentencing procedure violated a "clear and unequivocal rule of law." We begin this analysis with *Apprendi*, in which the defendant was convicted of second-degree unlawful possession of a firearm, an offense carrying a maximum penalty of ten years imprisonment. *655530 U.S. at 469-70, 120 S.Ct. 2348. On the prosecutor's motion, the sentencing judge found by a preponderance of the evidence that the crime had been committed " 'with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " *Id.* at 469, 120 S.Ct. 2348 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West

Supp.1999-2000)). This judicial finding had the effect of doubling from ten years to twenty years the maximum sentence to which Apprendi was exposed. *Id.* at 469, 120 S.Ct. 2348. The judge sentenced Apprendi to twelve years in prison, two years more than the maximum that would have applied but for the judicial finding of racial motivation. *Id.* at 471-72, 120 S.Ct. 2348. The Court held that imposition of this departure sentence violated *Apprendi's* Sixth Amendment right to a jury trial, stating: "[o]ther than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348.

In *Blakely,* the Court applied and expounded upon *Apprendi.* At issue in *Blakely* was the State of Washington's "determinate sentencing scheme." [FN18] Blakely had been charged with first-degree kidnapping, but he pleaded guilty to

second-degree kidnapping with a firearm, a class B felony punishable by a term of not more than ten years. Other statutory provisions mandated a "standard" sentence of forty-nine to fifty-three months, unless the judge found aggravating facts justifying an exceptional sentence. *Blakely*, 124 S.Ct. at 2537. Although the prosecutor recommended a sentence in the standard range, the judge found that Blakely had acted with "deliberate cruelty" and sentenced him to ninety months, a sentence approximately three years longer than the fifty-three month maximum sentence available in the standard range. Blakely appealed, arguing that this sentencing procedure deprived him of his Sixth Amendment right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. *Id.* at 2534- 35.

FN18. *Booker*, 125 S.Ct. at 749. "Determinate sentencing" has been widely understood to refer to a sentencing scheme that lacks a discretionary release mechanism, such as parole.

"Determinancy" describes the extent to which a judge's sentence determines the length of time a defendant will actually serve in prison. "Indeterminate sentencing" has been widely understood to refer to a system in which a releasing authority, such as a parole board, has discretion to release a defendant prior to expiration of the full sentence imposed. However, the Court in *Booker* and *Blakely* used the term "determinate sentencing" to refer to sentencing systems in which a judge's discretion is constrained by an internal sentencing threshold. The Court used the term "indeterminate sentencing" to refer to systems with no such internal constraints, where judges are free to sentence anywhere within the statutory limits. Jon Wool, *Beyond Blakely: Implications of the Booker Decision for State Sentencing Systems,* at 3, Policy and Practice Review (Vera Inst. of Justice February 2005), *at* http://www.vera.org/publications/publications_5.

In concluding that Washington's sentencing procedure violated *Blakely's* Sixth Amendment right to a jury trial, the Court emphasized that the "deliberate cruelty" finding had been based upon facts that were neither admitted by Blakely nor found by a jury beyond a reasonable doubt. The Court pointed out that the guilty plea authorized the Washington trial judge to impose a sentence within the standard range of forty-nine to fifty-three months. Absent the finding of "deliberate cruelty," the trial judge could not have imposed the exceptional ninety month sentence. *Id.* at 2537. The Court rejected the State's argument that the jury verdict ***656** was sufficient to authorize a sentence anywhere within the ten-year statutory range for Class B felonies, explaining:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any

> additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. (citations omitted). Accompanying this explanation of "statutory maximum" was a discussion of the nature and limits of the Sixth Amendment:

> First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial fact finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence--and by reason of the

> Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Id. at 2540 (emphasis in original). *Blakely* thus drew a constitutionally significant distinction between judicial factfinding in a "determinate" sentencing scheme and judicial factfinding in an "indeterminate" sentencing scheme. *See* footnote 18, *supra*. The Court's holding in *Booker* focuses to an even greater degree upon this distinction.

In *Booker*, the Court addressed the question specifically left unanswered in *Blakely*--whether the Federal Sentencing Guidelines ("Guidelines") violate the Sixth Amendment right to jury trial. Booker was convicted of possession with intent to distribute at least fifty grams of cocaine base, an offense statutorily punishable by ten years to life in prison. *Booker*, 125 S.Ct. at 746. Based upon his criminal history and the quantity of drugs found by the jury, the Guidelines set Booker's maximum sentence at 262 months (twenty-one years and ten months). *Id.* At a sentencing hearing, the district

judge concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of cocaine base and that Booker was guilty of obstructing justice. Under the Guidelines, these additional findings mandated a sentence between 360 months to life imprisonment, and the trial judge imposed a sentence of 360 months (thirty years). *Id.* The Seventh Circuit reversed, holding that application of the Guidelines to impose a sentence in excess of the maximum ***657** sentence authorized by the jury verdict alone conflicted with *Apprendi.*

In *United States v. Fanfan,* the case consolidated with *Booker,* the defendant was convicted of conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine, offenses statutorily punishable by a sentence of five to forty years. *Booker,* 125 S.Ct. at 747. Based upon the jury's verdict, the Guidelines set Fanfan's maximum sentence at seventy-eight months. The district

court conducted Fanfan's sentencing hearing shortly after the Court rendered its decision in *Blakely*. The district court found additional facts by a preponderance of the evidence that would have mandated a Guidelines sentence between 188 and 235 months. However, in light of *Blakely* the district court declined to impose the mandatory increase and instead imposed the seventy-eight month maximum sentence authorized by the jury's verdict. *Id.* at 747.

[26] The United States Supreme Court agreed with the lower courts' conclusions that application of the Guidelines to impose upon Booker and Fanfan a sentence in excess of that authorized by the jury's verdict violated the Sixth Amendment right to a jury trial. In so holding, the Court observed that "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures" at issue in *Blakely*. *Booker*, 125 S.Ct. at 749. *This conclusion, the Court explained, "rests on the premise,*

common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." Id. (emphasis added). Further explaining the mandatory versus non-mandatory distinction, the Court in *Booker* observed:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, *their use would not implicate the Sixth Amendment.* We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed,*everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges;* it is that circumstance that makes the Court's answer to the second question presented possible. *For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.*

Id. at 750 (emphasis added). Thus, *Booker* instructs us that the Sixth Amendment is not implicated by a sentencing procedure which uses non-binding, advisory enhancement

factors to inform and to guide the judge's selection of an appropriate sentence in the statutory range authorized by the jury's verdict. The remedial majority opinion, authored by Justice Breyer, confirms that allowing a judge to find and to consider enhancement factors in a non-mandatory, discretionary sentencing system does not violate the Sixth Amendment. Indeed, the remedy applied in *Booker requires* district judges to do so in all future cases. *Id.* at 764 (excising the statute making the Guidelines binding on sentencing courts and the statute requiring de novo review of sentences on appeal, and stating that "[w]ith these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements."). ***658** Justice Breyer explained that the statutory provision which made the Guidelines mandatory and binding on district court judges "is a necessary condition of the constitutional violation. That is

to say without this provision ... the statute falls outside the scope of *Apprendi's* requirement." *Id.* at 764. Thus, in *Booker* all nine justices agreed that the Sixth Amendment is not implicated by a sentencing statute which permits judge fact-finding, but which does not mandate imposition of an increased sentence upon the judge's finding of a fact. *Id.* at 749-50, 764.

Admittedly, *Blakely* itself includes language which can be broadly construed to require the result the defendants seek. We are unwilling to adopt that broad reading of *Blakely*. *Blakely* must be read in light of *Booker*. Not only has *Booker* provided further insight as to the constitutionally significant differences between "determinate" and "mandatory" sentencing schemes versus "indeterminate" and "non-mandatory" sentencing schemes, this Court has a duty to resolve doubts in favor of the constitutionality of statutes. In our view, *Booker* confirms that Tennessee's sentencing

structure differs markedly and in constitutionally significant ways from the Guidelines and the New Jersey and Washington statutes at issue in *Apprendi* and *Blakely*.

The Tennessee Criminal Sentencing Reform Act of 1989 ("Reform Act") (1) divides felonies into five classifications according to the seriousness of the offenses; (2) separates offenders into five classifications according to the number of prior convictions; (3) assigns a span or range of years for each class of crime committed by each class of offenders; and (4) employs enhancement and mitigating factors to assess the definite sentence within each range. Tenn.Code Ann. §§ 40-35-105-114 (2003); *State v. Jones*, 883 S.W.2d 597, 600 (Tenn.1994). Under the Reform Act, trial courts *must consider* the following in assessing a sentence:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing [FN19] and arguments as to sentencing alternatives;

FN19. As to sentencing principles, the statute provides:

> (1) Sentences involving confinement should be based on the following considerations:
>
> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant;
>
> (2) The sentence imposed should be no greater than that deserved for the offense committed;
>
> (3) Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided;
>
> (4) The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed;
>
> (5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed....
>
> (6) Trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation and/or community service.

Tenn.Code Ann. § 40-35-103 (2003). Finally, the Act directs that an appropriate sentence is one which is "justly deserved

in relation to the seriousness of the offense," is "fair and consistent [with other similar cases]," and "prevent[s] crime and promote[s] respect for the law." Tenn.Code Ann. § 40-35-102 (2003); *State v. Ashby*, 823 S.W.2d 166, 168 (Tenn.1991).

***659** (4) The nature and characteristics of the criminal conduct involved;

> (5) Evidence and information offered by the parties on the enhancement and mitigating factors ...; and
> (6) Any statement the defendant wishes to make in his own behalf about sentencing.

Tenn.Code Ann. § 40-35-210(b) (2003); *Ashby*, 823 S.W.2d at 168. The Reform Act classifies offenses according to their seriousness and offenders according to their prior convictions and thereby predetermines the nature and extent of punishment that should be imposed for similar offenses committed by similar offenders. *Jones*, 883 S.W.2d at 600. The Reform Act affords judges discretion to select an appropriate sentence within a predetermined statutory range,

but judges in Tennessee have no authority to impose a sentence outside the statutory range. In exercising their discretion to select an appropriate sentence within the range, the Reform Act, much like the remedy adopted in *Booker*, requires that judges find and consider statutory enhancement factors and mitigating factors. Judges may consider all enhancement factors that are "appropriate for the offense" and "not themselves essential elements of the offense." Tenn.Code Ann. § 40-35-114 (2003). Significantly, no provision in the Reform Act mandates an increase in a defendant's sentence upon the finding of an enhancement factor.

Unlike the statutes at issue in *Blakely* and *Booker*, a judicial finding of an enhancement factor in Tennessee does not affect the range of punishment to which a defendant is exposed. Tennessee Code Annotated section 40-35- 210(c) through (e) provides:

(c) The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. The presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors.
(d) Should there be enhancement but no mitigating factors for a Class B, C, D or E felony, then the court may set the sentence above the minimum in that range but still within the range. Should there be enhancement but no mitigating factors for a Class A felony, then the court shall set the sentence at or above the midpoint of the range. Should there be mitigating but no enhancement factors for a Class A felony, then the court shall set the sentence at or below the midpoint of the range.
(e) Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. Should there be enhancement and mitigating factors for a Class A felony, the court must start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors.

Thus, even after an enhancement factor is found, this statute affords to the judge discretion to choose an appropriate sentence anywhere within the statutory range, including the

presumptive minimum sentence within the range. For Class B, C, D or E felonies, section -210(d) provides specifically that, if there are enhancement but no mitigating factors, the trial judge "*may* set the sentence above the minimum in that range but still within the range." Tenn.Code Ann. § 40-35-210(d) (2003) ***660** (emphasis added). For Class A felonies, section -210(d) provides that if there are enhancement but no mitigating factors, the trial judge "shall set the sentence *at or above* the midpoint of the range." *Id.* (emphasis added). Although the statute employs mandatory language ("must"), this language is qualified by the phrase "at or above the midpoint of the range" and by section -210(c), which sets the presumptive minimum for Class A felonies at the midpoint of the range, and which does not mandate enhancement above the midpoint.

Section -210(e), similarly prescribes use of an advisory, discretionary procedure when a judge finds both enhancement

and mitigating factors. The statute provides that the judge "must start at the minimum sentence in the range, enhance the sentence within the range *as appropriate* for the enhancement factors, then reduce the sentence within the range *as appropriate* for the mitigating factors." (Emphasis added.) Although this section includes mandatory language, ("must" and "shall"), read in context this mandatory language loses its mandatory effect because this section directs the judge to enhance and to mitigate the sentence "as appropriate," thereby affording to the judge discretion to select an appropriate sentence anywhere within the range.

Thus, the finding of an enhancement factor simply does not mandate an increased sentence. Instead, the Reform Act thus provides what *Blakely* and *Booker* describe as an "indeterminate," non-mandatory, advisory sentencing scheme which merely requires judges to consider enhancement factors, along with other information, when exercising their

discretion to select an appropriate sentence within the statutory range. Unlike the Washington sentencing statutes and the Guidelines, the Reform Act requires the trial judge to consider enhancement and mitigating factors to aid the trial judge in exercising discretion and choosing a sentence within the statutory range, but the Reform Act does not *mandate* an increased sentence upon a judge's finding of an enhancement factor. Rather, upon finding an enhancement factor under the Reform Act, a judge has the discretion to select a sentence *at or above* the presumptive minimum. Imposition of a sentence above the presumptive sentence represents an exercise of the judge's discretion.

The dissent, the defendant, and the State point out that when no enhancement or mitigating factors are found, section 40-35-210(c) mandates imposition of the presumptive sentence. Although we do not disagree with this proposition, we also do not view it as dispositive of the constitutional

issue. Unlike the "standard range" statute in *Blakely*, section -210(c) does not lower the ceiling for felony sentences, nor is it like the statute in *Apprendi* which exposed the defendant to a punishment greater than that otherwise legally prescribed. Section -210(c) operates solely to limit the sentencing court's discretion in selecting a penalty within the available range by mandating imposition of the presumptive sentence when there "are no enhancement or mitigating factors." Tenn.Code Ann. § 40-35-210(c) (2003). The dissent contends that section -210(c) "fixes a *determinate* point, not a range and the trial judge has no discretion to deviate from this determinate point unless he or she makes additional findings that enhancement factors are present." The dissent's observation about how the statute functions is accurate. However, the dissent misinterprets the constitutional relevance of this observation.

The United States Supreme Court explained in *Booker* that "when a trial judge exercises his [or her] discretion to

select a specific sentence within a defined range, *661 the defendant has no right to a jury determination of the facts that the judge deems relevant." 125 S.Ct. at 750; *see also Harris v. United States*, 536 U.S. 545, 558, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) ("Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.") Indeed, all nine justices agreed in *Booker* that the relevant constitutional inquiry is not whether a judge exercises sentencing discretion by finding facts, but rather whether the judge's finding of a fact mandates an increased sentence. 125 S.Ct. at 749-50, 764. Thus, to determine whether the defendants' sentences were imposed in violation of the Sixth Amendment, the relevant inquiry is not whether the Reform Act permits judicial fact-finding. Nor is the relevant inquiry whether the Reform Act sets a determinate point at which

judges must begin the exercise of their discretion and provides a determinate sentence which must be imposed *in the absence of enhancement and mitigating factors.* Rather, the relevant inquiry is whether the Reform Act mandates imposition of a sentence *increased* above the presumptive sentence *when a judge finds an enhancement factor.* Although the dissent is correct that the Reform Act requires trial judges to determine whether enhancement factors exist, the dissent fails to recognize that the finding of an enhancement factor does not mandate an increased sentence. *Booker* explains that the mandatory increase of a sentence is the crucial issue which courts must consider in determining whether a particular sentencing scheme violates the Sixth Amendment.

[27] Considering this point, we conclude that the defendants' sentences were not imposed in violation of the Sixth Amendment. The Reform Act authorizes a

discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors. The Reform Act does not include a formula, a grid, or any other mechanical process. It instead sets out broad sentencing principles, enhancement and mitigating factors, and a presumptive sentence, all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature. Under the Reform Act, the finding of an enhancement factor does not mandate an increased sentence. The Reform Act does not provide a system which requires or even allows judicial power to "infringe [ ] upon the province of the jury." *Blakely*, 124 S.Ct. at 2540. Thus, for these reasons, and in accordance with our duty to indulge every presumption in favor of the constitutionality of statutes--a duty which the dissent fails to discuss--we conclude that

Tennessee's sentencing structure does not violate the Sixth Amendment. [FN20]

FN20. In response to the United States Supreme Court's decision in *Blakely,* Governor Bredesen appointed a "Task Force on the Use of Enhancement Factors in Criminal Sentencing." After many meetings, this Task Force recently issued a Report which includes recommendations for statutory amendments. This decision should not be construed as a comment upon the work or recommendations of the Task Force. Rather, this decision is limited to the issues presented by the case on appeal, and in resolving these issues this Court must afford to the sentencing statutes a presumption of constitutionality. Determining whether the recommendations of the Task Force should be adopted in whole or in part is a matter for the Governor and the General Assembly.

For these reasons, we are unable to accept the State's concession that the defendants' *662 sentences were imposed

in violation of the Sixth Amendment. In light of our holding that the defendants' sentences were not imposed in violation of the Sixth Amendment, the defendants are not entitled to relief because the record reflects no plain error. The trial court carefully considered the enhancement and mitigating factors and exercised judicial discretion consistent with the statute. The evidence does not preponderate against the trial court's decision imposing the maximum sentence or the trial court's decision ordering consecutive service of the sentences.

IV. *Conclusion*

Because the defendants failed to properly preserve their constitutional claims of error, we have reviewed these claims for plain error and have determined that the defendants are not entitled to relief. Accordingly, the defendants' convictions and sentences are affirmed. It appearing that the defendants are indigent, costs of this appeal are taxed to the State of Tennessee.

E. RILEY ANDERSON, J., filed a concurring and dissenting opinion, in which ADOLPHO A. BIRCH, JR., J., joined.

E. RILEY ANDERSON, J., concurring in part and dissenting in part.

I agree that neither defendant is entitled to relief under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and concur in that part of the Court's opinion. I disagree, however, with the majority's discussion and application of *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), to Tennessee's Criminal Sentencing Reform Act of 1989 ("Reform Act"). The majority concludes that the defendants' sentences, imposed under Tennessee Code Annotated section 40-35-210 (2003), do not violate their Sixth Amendment right to trial by jury. *See United States v. Booker,* --- U.S. ----, ---, 125 S.Ct. 738, 750, 160 L.Ed.2d 621 (2005); *Blakely,* 124 S.Ct. at 2537. *I disagree.*

In my view, the presumptive sentences set forth in Tennessee Code Annotated section 40-35-210 established a fixed point for the defendants' sentences such that the upward departure, based solely on findings made by the trial judge, was imposed in violation of Blakely and therefore violated the defendants' Sixth Amendment right to trial by jury. I also disagree with the majority's conclusions that *Blakely* did not announce a new rule and that we should strictly apply issue preservation principles when determining whether a defendant has preserved a *Blakely* claim. I would therefore vacate the defendants' sentences and remand to the trial court for resentencing in light of *Blakely* and *Booker*.

I. *Constitutionality of the Tennessee Reform Act*

I begin my analysis by examining the three recent United States Supreme Court cases which drastically altered the legal landscape by determining that, when a trial judge imposes a sentence in excess of the maximum authorized by the jury's

verdict alone, the sentence violates the Sixth Amendment right to trial by jury.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348. Although the court has since clarified the meaning of "the prescribed statutory maximum," it has not deviated from the core principle set forth in *Apprendi:* where the legislature has defined a crime and set a punishment for *663 that crime, a trial judge may not impose a sentence exceeding the maximum punishment authorized by the jury's verdict alone. *Id.; see also Blakely,* 124 S.Ct. at 2538; *Booker,* 125 S.Ct. at 756. As I will explain, *Apprendi's* core holding did not change with *Booker* and invalidates the defendants' sentences.

A.

In *Apprendi,* the defendant pled guilty to a crime statutorily punishable by up to ten years in prison. The trial judge, however, made additional findings and sentenced the defendant to twelve years--two years outside the maximum statutory range. 530 U.S. at 469-71, 120 S.Ct. 2348. *Apprendi* held that this departure beyond the statutory maximum, based on facts not found by a jury, was unconstitutional. *Id.* at 490, 120 S.Ct. 2348.

The court reasoned that the Sixth Amendment jury trial guarantee, coupled with the Due Process protections of the Fourteenth Amendment, "indisputably entitle [s] a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " *Id.* at 477, 120 S.Ct. 2348 (citation omitted). The court explained that at common law, it was the province of the jury to determine whether a defendant had

committed all of the elements charged, and it was the role of the judge merely to impose sentence based on the jury's findings. *Id.* at 478-79, 120 S.Ct. 2348. The court extracted from this history the principles that any fact necessary to support a defendant's punishment constitutes an element of the crime and that all elements must be charged in the indictment and found by a jury beyond a reasonable doubt. *See* at 490, 120 S.Ct. 2348.

The court explained that the New Jersey sentencing scheme at issue in *Apprendi,* whereby the judge could enhance sentences by finding additional elements not found by the jury, was incompatible with the Sixth Amendment: The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal

defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Apprendi,* 530 U.S. at 482-83, 120 S.Ct. 2348.

Although *Apprendi's* limitation on judicial fact-finding called into question the ability of judges ever to make findings relevant to sentencing, the court seemed to limit *Apprendi* only two years later, in *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). In *Harris,* five members of the court upheld a federal statute permitting a judge to impose an increased *minimum* sentence based on facts not found by the jury. *Id.* at 568, 122 S.Ct. 2406. Although the court split four votes to four as to whether *Apprendi* permitted this result, the majority upheld the sentence. *See id.* The result in *Harris,* then, indicated that *Apprendi* only applied when a judge found facts used to sentence a defendant above the range for the crime of which

he had been convicted. The open question, however, was what constituted the applicable "range."

The two cases that very recently addressed that open question were *Blakely* and *Booker*. In discussing*Blakely* and *Booker*, it is critical to understand the sentencing systems that were at issue in those two cases. *Booker* dealt with the Federal Sentencing Guidelines. *See* 125 S.Ct. at 746. *Blakely* dealt with Washington ***664** state's Reform Act. *See* 124 S.Ct. at 2535. Those sentencing systems operated as follows. After a jury convicted a defendant (or a defendant entered a guilty plea) as to a particular crime, the sentencing judge was not free to impose a sentence anywhere within the statutory range. Rather, under the federal Guidelines, a judge was required to start at a "base range" determined by the jury's verdict. *See* U.S. Sentencing Guidelines Manual § 1B1.1 (2004). The Washington Reform Act similarly set forth a narrow "standard range" corresponding to the jury's verdict.

See Wash. Rev.Code Ch. 9.94A.530 (2004). After determining the starting point based upon the jury's verdict, both sentencing systems then required a judge to consider a host of factors in addition to the jury's verdict to determine whether a defendant should receive an enhanced sentence. Under the federal Guidelines, judicial findings of enhancement factors required a judge to move the defendant up from the base range to higher ranges. This system was mandatory, so that its effect was to overlay the full statutory range with a series of mandatory "mini-ranges." Under the Washington system, however, a judge was permitted, but not required, to enhance a sentence beyond the standard range if he or she determined that aggravating factors justified a departure. The result was that both the federal Guidelines and the Washington Reform Act specified a "base" or "standard" range as the starting point based upon the jury's verdict. Any upward departures from that starting point could only be

made upon a judge's finding of fact. *See Blakely,* 124 S.Ct. at 2535; *Booker,* 125 S.Ct. at 750-51.

Prior to Blakely and in light of *Harris, Apprendi* was generally understood only to prohibit a judge from departing beyond the upper limit of a statutorily-defined range based on facts not found by a jury. *Apprendi* did not appear to affect sentencing schemes where a judge made findings that moved a defendant out of the base range or from one "mini-range" to another, as long as the sentence did not go outside the statutory range. *See Simpson v. United States,* 376 F.3d 679, 681 (7th Cir.2004) (documenting that "before *Blakely* was decided, every federal court of appeals had held that *Apprendi* did not apply to guideline calculations made within the statutory maximum"); *see also, e.g., United States v. Helton,* 349 F.3d 295, 299 (6th Cir.2003) ("[O]nce the jury has determined guilt, the district court may sentence the defendant to the statutory minimum, the statutory maximum, or

anything in between, based on its (proper) application of the Guidelines and based on its (permissible) preponderance-of-the-evidence findings under the Guidelines.").

The *Blakely* decision, released in June 2004, held that--contrary to the widely-held interpretation of *Apprendi*--because the base range or standard range created by a sentencing scheme constitutes the "statutory maximum" under *Apprendi*, "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 124 S.Ct. at 2537. In other words, *any* fact (other than facts admitted by a defendant or a prior conviction) that increases a defendant's sentence beyond the prescribed base or standard range for that particular offense must be found by a jury.

Blakely thus radically constricted the ability of judges to go outside the narrow basic range of punishment specified by

the legislature.[FN1] The effect of *Blakely* was to *665 reduce the applicable range to the base range or standard range set forth in a sentencing scheme, as opposed to the full range of years set forth in the criminal statutes. However, although it rendered a narrow definition of what constitutes the "maximum range," the court left intact a judge's ability to exercise discretion in sentencing within that greatly-reduced range. Indeed, in *Apprendi,* the court had stated that judges are free to exercise discretion in sentencing "in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." *Apprendi,* 530 U.S. at 481, 120 S.Ct. 2348 (emphases in original) (citation omitted).

FN1. Washington's Sentencing Reform Act is embodied in the state code. *See* Wash. Rev.Code Ch. 9.94A. Although not embodied in the United States Code, because the Federal

Sentencing Guidelines "are binding on judges," the court has "consistently held that the Guidelines have the force and effect of laws." *Booker,* 125 S.Ct. at 750 (citations omitted); *see also id.* at 752.

This year's Booker decision reaffirmed that this language in *Apprendi* was still good law after *Blakely,* clarifying that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Booker,* 125 S.Ct. at 750. In other words, as long as a judge stays within the *appropriate range,* the decision may be based on facts not found by a jury. The court's solution was to excise the portion of the Federal Sentencing Guidelines making them binding on judges. *Id.* at 756- 57. In effect, then, by making the Guidelines advisory, the court restored the full statutory range as the applicable range of punishment. With the elimination of the mandatory base

range and mini-ranges created by the Guidelines, a jury's verdict will support punishment anywhere within the range set forth in the statute, and a trial judge will be free to exercise his or her discretion to impose a sentence anywhere within that range, based on whatever facts "the judge deems relevant." *Booker*, 125 S.Ct. at 750.

Having explained the holdings of *Apprendi*, *Blakely*, and *Booker*, I now discuss why, in my view, *Booker* does not salvage the constitutionality of the Tennessee Reform Act.

B.

Relying on *Booker*, the majority concludes that Tennessee's Reform Act provides the sort of indeterminate, discretionary range within which the Supreme Court has held that a judge may exercise discretion. The majority concludes that Tennessee Code Annotated section 40-35-210 "merely requires judges to consider enhancement factors ... but [it]

does not *mandate* an increased sentence upon a judge's finding of an enhancement factor."

I agree with the majority that, on its face, *Booker* made the constitutionality of the Tennessee Reform Act a closer question than it was considering *Blakely* alone. In applying *Booker* to the statutory ranges set forth in the Tennessee Reform Act, however, the majority ignores the fact that the Reform Act sets a "presumptive sentence" for each class of felony within each range. Tenn.Code Ann. § 40-35-210(c) ("The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. The presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors."). The presumptive sentence is comparable to the base range of the federal ***666** Guidelines and the standard range of the Washington Reform Act.

As we have often observed, Tennessee's "presumptive sentences" are not merely advisory. Rather, "[t]he minimum sentence is the presumptive sentence. The sentence imposed cannot exceed the minimum sentence in the range unless the State proves enhancement factors." *State v. Jones,* 883 S.W.2d 597, 601 (Tenn.1994) (citation omitted); [FN2] *see also State v. Gutierrez,* 5 S.W.3d 641, 644 (Tenn.1999); *State v. Carico,* 968 S.W.2d 280, 288 (Tenn.1998). In other words, "[i]f there are no enhancement or mitigating factors, then the court must impose the minimum sentence within the appropriate range." Sentencing Comm'n Comments to Tenn.Code Ann. § 40-35-210 (emphasis added).

FN2. At the time we decided *Jones,* the presumptive sentence for all felonies was the minimum within the range. The statute has since been amended to make the presumptive sentence for Class A felonies the midpoint of the range rather

than the minimum. 1995 Pub.Acts. c. 493, § 1, eff. July 1, 1995; 1998 Pub.Acts, c. 914, § 1, eff. May 7, 1998.

Thus, the effect of the mandatory presumptive sentence is to create a determinate sentence, not a range. In this respect, the Tennessee Reform Act is even more restrictive than the Washington sentencing scheme or the Federal Sentencing Guidelines, because rather than creating a base or standard range, the Reform Act authorizes only a single sentence based on the jury's verdict-- the minimum sentence, in the case of Class B, C, D, or E felonies, and the midpoint of the range in the case of Class A felonies. Under Tennessee's Reform Act, the jury verdict alone does not allow "a trial judge [to] exercise [ ] his discretion to select a specific sentence within a defined range." *Booker*, 125 S.Ct. at 750. The presumptive sentence fixes a *determinate* point, not a range, and the trial judge has no discretion to deviate from this determinate point

unless he or she makes additional findings that enhancement factors are present.

Because enhancement factors must be factors separate from the elements of the crime, *see* Tenn.Code Ann. § 40-35-114, they are by definition facts not found by the jury and are therefore invalid under *Apprendi* and *Blakely,* even as clarified in *Booker.* The only exception, of course, is prior convictions, which need not be found by the jury in order to be used as enhancement factors. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348. However, because the Reform Act does not require a judge to apportion a sentence enhancement among the various enhancement factors, it is often impossible to parse the degree to which an enhanced sentence is based on prior convictions and the degree to which it is based on impermissible enhancement factors.

My view of the United States Supreme Court's reasoning in *Booker* differs from the majority's. The majority reads

Booker to permit any range-based sentencing scheme as long as the scheme does not *require* a judge to increase a defendant's sentence based upon a finding of an enhancement factor. Because Tennessee's Reform Act does not *mandate*, but merely permits, an increased sentence based upon a judge's finding of an enhancement factor, the majority concludes that it is constitutional. However, the "mandatory" facet of the Federal Sentencing Guidelines to which the court in *Booker* objected was not the fact that the Guidelines mandated upward departures based upon particular judicial findings of fact. Rather, it was the fact that *no* departures could be justified based on the jury verdict alone, because the jury verdict alone authorized only the base range sentence. "Whether the judicially determined facts *require* a sentence or merely *allow* it, the verdict alone does ***667** not authorize the sentence." *Blakely*, 124 S.Ct. at 2538 n. 8. The solution adopted by the *Booker* majority, excision of the provisions

making the federal Guidelines binding upon judges, eliminated the mandatory base range sentence, restoring a judge's discretion to impose a sentence anywhere within the entire statutory range. *See* 125 S.Ct. at 756-57.

The Washington state scheme struck down in *Blakely* was effectively the same as Tennessee's Reform Act. It mandated a "standard range" based upon the jury's verdict and then permitted, *but did not require,* a judge to enhance the defendant's sentence in response to judicially-determined enhancement factors. Critically, *Booker* did not change *Blakely's* holding that the Washington state scheme was unconstitutional. Indeed, *Booker* noted that "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue" in *Blakely. Booker,* 125 S.Ct. at 749. Again, then, under *Apprendi, Blakely,* and *Booker,* the Sixth Amendment is implicated not when judicial discretion is constrained, but

when a judge departs beyond the upper limit of the sentence authorized by the jury's verdict alone. Because Tennessee's Reform Act is functionally identical to the Washington Reform Act in that it constricts the statutory range from a range of years to a mandatory, determinate point, any sentences imposed beyond that point based upon facts not found by a jury are unconstitutional. Were the legislature simply to eliminate the presumptive sentence, in my view, Tennessee's Reform Act would be constitutional.[FN3]

FN3. This is the solution proposed by the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing.

In sum, the Tennessee Reform Act does not provide the sort of open, indeterminate sentencing range envisioned in *Booker*. Rather, as this Court has consistently interpreted it, the Reform Act sets forth a presumptive sentence and constrains a judge's discretion in departing from that sentence.

Therefore, the Reform Act does not pass constitutional muster under *Apprendi*, *Blakely*, and *Booker* because it permits a trial judge to impose a sentence in excess of the maximum sentence authorized by the jury verdict alone.[FN4]

FN4. Moreover, *Booker* explained that in a true range scheme, a judge may consider *any* factors he or she deems relevant in assessing a sentence. However, under the Tennessee Reform Act, the judge's discretion is restricted in a number of ways. First, "[t]he State has the burden of proving any enhancement factors." *Gutierrez*, 5 S.W.3d at 644. Additionally, "only those enhancement factors specifically authorized by statute may be used to increase a sentence." *Jones*, 883 S.W.2d at 601. Finally, the propriety of applying a particular enhancement factor to a particular case is subject to appellate review. *See, e.g., Gutierrez*, 5 S.W.3d at 645 (examining sentence enhancement based on abuse of a position of private trust).

The majority's conclusion that the Reform Act is a discretionary sentencing procedure with "merely advisory" statutory enhancement factors may come as a surprise not only to both parties in this case but also to trial and appellate judges throughout the state. For fifteen years, we have emphasized that the purposes of the Reform Act included consistency and uniformity in sentencing. Tenn.Code Ann. §§ 40-35-102, -103. Trial courts have been admonished to adhere to the procedures of the Reform Act and to make detailed findings of fact whenever applying enhancement factors to enhance a sentence. The majority's conclusion that the application of these principles has been merely advisory and fully discretionary throughout the entire sentencing range is *668 inconsistent with both the Reform Act and this Court's interpretation of it over the past fifteen years.

In the case before us, the record reveals that the defendants' sentences were enhanced by fifteen years, or 44%,

based on facts not found by a jury. The sentencing judge relied on a number of factors in enhancing both defendants' sentences, to wit: the trial judge found that both defendants had prior criminal convictions; that both were leaders in the commission of the offense; that, as to three of the four counts, the amount of property taken was great; and that, as to Count Two, the defendants possessed or employed a firearm. Tellingly, the trial judge acknowledged that her decision that the defendants were leaders in the offense was not consistent with the jury's verdict. She stated, however, that "we must keep in mind that enhancing factors must only be proven by preponderance of the evidence, not beyond a reasonable doubt, so that even though the jury's verdict might have been different," she was electing to apply the enhancement factor. This discrepancy between a jury's findings and a judge's findings is precisely what *Apprendi* and

Blakely held that the Sixth Amendment is intended to guard against.

The trial judge noted that she was giving great weight to the prior criminal convictions, but did not make sufficient findings to reveal the portion of the enhancement attributable to the prior convictions. The judge applied the enhancement factors to impose the maximum sentence for each count and ordered that the sentences run consecutively, for an effective total sentence of forty-nine years. By applying the Reform Act to sentence the defendants to a total of fifteen years more than the maximum sentences authorized by the jury's verdict, the trial judge violated the defendants' Sixth Amendment rights. Because, as I explain below, I would hold that *Blakely* announced a new rule and that the defendants timely raised *Blakely* claims such that they are entitled to review, I would vacate their sentences and remand for resentencing.

II. *New Rule*

In *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final...." In my view, *Blakely* announced a "new rule" within the meaning of *Griffith*.

Following *Apprendi*, it was widely understood that the relevant "statutory maximum" was the full statutory range of punishment available for a particular offense. *See, e.g., Simpson*, 376 F.3d at 681. *As explained above, Blakely* fundamentally altered this widely-held understanding.

Apprendi was decided by a 5-4 split, with the Justices filing five separate opinions. The court itself seemed to struggle with the precise scope of *Apprendi*, as is evidenced by the four separate opinions filed in *Harris* only two years later and the lack of a controlling rationale in *Harris*. *See* 536

U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524. *Apprendi's* scope and ramifications, therefore, were certainly open to debate.

In constricting the definition of statutory maximum, "*Blakely* radically reshaped our understanding of a critical element of criminal procedure." *Smylie v. State,* 823 N.E.2d 679, 687 (Ind.2005). Several courts have recognized that this "radical[ ] reshap[ing]" of *Apprendi* constituted a new rule. *See, e.g., Simpson,* 376 F.3d at 681; *United States v. Price,* 400 F.3d 844, 847 (10th Cir.2005); ***669***Smylie,* 823 N.E.2d at 687. Our Tennessee Court of Criminal Appeals has repeatedly so held. *See, e.g., State v. Walters,* 2004 WL 2726034 at *20 (Tenn.Crim.App. Nov.30, 2004) . Most significant to defendants' appeal, this Court failed to predict the extension of *Apprendi* wrought in *Blakely. See Graham v. State,* 90 S.W.3d 687, 691-92 (Tenn.2002) *(rejecting Apprendi*-based challenge to the Reform Act). Certainly,

then, for purposes of Tennessee law, *Blakely* announced a new rule.

Additionally, in this year's decision applying *Blakely* to the Federal Sentencing Guidelines, the Supreme Court itself stated that it was announcing a new rule. *United States v. Booker,* 125 S.Ct. at 769 (commenting that holding would apply to all federal cases on direct review). If *Booker,* which was merely an application of *Blakely,* stated a new rule, then surely *Blakely* did, too.

I agree with the majority that when the United States Supreme Court announces a new constitutional rule, that rule is retroactively applicable to all cases on direct review. *Griffith,* 479 U.S. at 328, 107 S.Ct. 708; *see also United States v. Johnson,* 457 U.S. 537, 562, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). *For this reason, I concur in Part II of the Court's opinion, concluding that Crawford* announced a

new rule but that the defendants are limited to plain error review because they failed to preserve the issue below. [FN5]

FN5. The majority suggests that it does not understand my concurrence in its *Crawford* analysis in light of my dissent from its *Blakely* analysis. The majority, however, errs in treating cases that do not announce "new rules" the *same as cases* that do announce "new rules." Moreover, unlike the majority, I would hold that the *Blakely* issue has been sufficiently preserved for the reasons explained in part III of my dissent. For these reasons, I cannot agree with the majority's application of plain error review to the defendants' *Blakely* claims.

I part ways with the majority, however, when it reaches its subsequent analysis. After the majority concludes that *Blakely* did not announce a new rule, it concludes that defendants are nevertheless entitled to plain error review.

Moreover, the majority suggests that defendants who preserved an issue below--even if that issue is not the subject of a new constitutional rule--are still entitled to plenary appellate review. *See* maj. op. at 651 ("[B]ecause the defendants failed to raise and preserve for review their Sixth Amendment challenge, the defendants are limited to seeking relief via plain error review.").[FN6] Under the majority's reasoning, the determination of whether or not a decision constitutes a "new rule" is irrelevant to the issue of retroactivity. Indeed, all decisions are now retroactive, whether they constitute a new constitutional rule or not. The only question is whether or not the defendant properly preserved the issue, entitling him to plenary review, or whether the defendant failed to preserve the issue, entitling him only to plain error review. As a result, the Court has created a framework under which two starkly different scenarios, one, the new constitutional rule in *Crawford* and

the other, a not--new constitutional rule in *Blakely*, are treated identically. Because the majority has therefore embarked on a new course that *670 renders traditional analysis of "retroactivity" obsolete, I dissent from Part III of the majority opinion in its entirety.

FN6. The case the majority cites for the proposition that plain error is determined with reference to the state of the law at the time of appeal, *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), was a case applying a new rule retroactively and so does not support the majority's position. Similarly, the majority's view that *Johnson* supports its conclusion that all decisions apply retroactively, whether or not based on a new constitutional rule, is misplaced; as I have noted, *Johnson* was based on a new constitutional rule.

III. *Preservation of Issue for Review*

The majority concludes that courts need only apply new rules to cases on direct review (so-called "pipeline" cases) if

the issue to which the new rule pertains was properly preserved for review. Although I agree with the proposition that plenary retroactive application of *Blakely* should be tempered by application of our prudential issue preservation rules, I do not agree with the majority's restrictive view of what is necessary to preserve a *Blakely* claim.

The U.S. Supreme Court has indicated that application of prudential review doctrines such as waiver and forfeiture will not run afoul of *Griffith*. *Booker*, 125 S.Ct. at 769. I do not believe the preservation requirement should be applied so stringently, however, as to require clairvoyance on the part of defendants or their attorneys. As explained above, the decision in *Blakely* was a widely-unforseen consequence of *Apprendi*. In my view, then, "requiring a defendant or counsel to have prognosticated the outcome of *Blakely* ... would be unjust." *Smylie*, 823 N.E.2d at 689; *see also United States v. Henningsen*, 387 F.3d 585, 591 (7th

Cir.2004) *(adopting lenient review standard with regard to Blakely* issues).

Although the majority asserts that "this Court has regularly limited retroactive application of new rules to only those cases pending on direct review in which the issue has been timely raised and properly preserved," majority op. at n. 9, a closer examination of the only two criminal cases cited by the majority reveals that our past practice has been to take a flexible approach to issue preservation requirements. In *Farris v. State,* 535 S.W.2d 608, 614 (Tenn.1976), a 3-2 majority of this Court invalidated a statute requiring that jury charges include instruction on the intricacies of parole eligibility after concluding that the body of the statute was broader than its caption. One year later, in *Adams v. State,* 547 S.W.2d 553, 557 (Tenn.1977), the Court addressed application of the *Farris* holding to petitioners on direct review. Although the defendants in *Adams* appealed their

sentences on the basis that the challenged statute was unconstitutionally vague--a rationale not supported by the majority decision in *Farris*--this Court concluded that review had been preserved:

> We recognize that our own rules, reflective of the case law of the state, require specificity in assignments. They also demand equitable and practical interpretation.... We are not willing to penalize a criminal defendant for an incomplete and/or inaccurate assignment. Especially would we not do this in a case wherein this very Court has been sharply divided, with at least four different views, all supportable by recognized legal principles, but only one of which was able to command even a bare majority.

Adams, 547 S.W.2d at 557.

Moreover, a hard-line application of preservation principles to *Blakely* claims may have the unintended consequences of burdening defense counsel with raising numerous speculative claims and burdening trial and appellate courts with disposing of them. As the Indiana Supreme Court recently observed in *Smylie*,

A very tough *Blakely* preservation rule would prompt practitioners to fill trial time and appellate briefs with all imaginable contentions, contrary to the general advice that it is good practice to focus on the most viable issues. It would also drastically alter the burden imposed on counsel as to what constitutes ***671** effective assistance to their clients.... An attorney is not required to anticipate changes in the law and object accordingly in order to be considered effective.... [A] trial lawyer or an appellate lawyer would not be ineffective for proceeding without adding a *Blakely* claim before *Blakely* was decided. Consequently, we do not deem the failure to raise a Sixth Amendment objection to the trial court as it proceeded through sentencing to constitute forfeiture of a *Blakely* issue for purposes of appellate review. 823 N.E.2d at 690 (quotations and citations omitted).

As another practical point, I note that we have implicitly held that *Blakely/Apprendi* claims are cognizable on post-

conviction review pursuant to Tennessee Code Annotated section 40-30-117 (2003). *See Graham*, 90 S.W.3d at 692 (considering whether enhancement of petitioner's sentence based on factors not found by a jury, but still within the statutory range, violated Apprendi). Because there is no issue preservation requirement for post-conviction claims brought under section 40-30-117, a petitioner whose sentence becomes final within one year of the *Blakely* decision will have the opportunity to raise a *Blakely* claim on collateral review, whereas petitioners still on direct review who have not preserved the issue will not be able to obtain plenary review of a *Blakely* claim.[FN7]

FN7. The majority argues that, based on cases decided in the United States Supreme Court, *Apprendi* and *Blakely* will not apply retroactively to cases on collateral review. While I agree that the U.S. Supreme Court has so held, the fact remains that we considered such an argument on the merits in

Graham. Although the majority states I have cited no authority for my position, the majority does not address *Graham.* Moreover, as we have often observed, this Court is free to interpret our State's statutes and Constitution as affording greater protection than does federal law. *See, e.g., State v. Harris,* 919 S.W.2d 323, 333 (Tenn.1996) ("We, as the Supreme Court of Tennessee, have the full and final power to interpret our state constitution. Tennessee, and every state, has the sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.") (citations and internal quotation omitted).

Because I believe that both equity and practical considerations weigh in favor of a more lenient standard, I would require only that a petitioner have made some objection to his sentence at trial and have timely raised the Blakely claim on appeal. See Smylie, 823 N.E.2d at 690

("[I]t does not ask too much that a criminal defendant have contested his or her sentence on appeal, even if the *Blakely* element of that contest is added later...."). In my view, such a rule would strike a sound balance between fairness and equity on the one hand, and gatekeeping and consistency concerns on the other.

IV. *Application to Defendants' Sentences*

The record reveals that, during the sentencing hearing, both defendants argued against application of the enhancement factors and against consecutive sentencing. The judge enhanced the defendants' sentences using four different enhancement factors. The only factor that may be constitutionally applied without being found by a jury is the enhancement for prior convictions. The judge indicated that she was "going to give great weight" to the enhancement factor based on prior criminal conduct, but did not indicate

the degree to which the increased sentences were based on that enhancement factor.

Both defendants argued to the Court of Criminal Appeals that their sentences were excessive and the Court of Criminal Appeals decided those claims on the merits. ***672** Although the defendants did not challenge their sentences on Sixth Amendment grounds, I would not fault them for failing to "have prognosticated the outcome of *Blakely*," *Smylie*, 823 N.E.2d at 689, particularly in light of our decision in *Graham*. Because they timely raised *Blakely* challenges in this Court, I would vacate their sentences as constitutionally invalid and remand to the trial court for resentencing.

Conclusion

Although I concur in the majority opinion as to its resolution of the defendants' *Crawford* issues, I disagree with the majority's discussion and resolution of the *Blakely* issues. I therefore dissent. I would hold, first, that *Blakely*

invalidates sentences under Tennessee Code Annotated section 40-35-210 to the extent that a judge enhances the sentence beyond the presumptive sentence based on facts, other than the fact of a prior conviction, not found by a jury; second, that *Blakely* announced a new rule; and third, that defendants on direct review are entitled to raise *Blakely* claims as long as they challenged their sentences below and as long as they timely added a *Blakely* claim to their appeal. I would therefore vacate Gomez's and Londono's sentences and remand to the trial court for appropriate resentencing.

I am authorized to state that Justice BIRCH joins with me in this concurring and dissenting opinion.

ORDER DENYING PETITION FOR REHEARING

DROWOTA, C.J.

Petitions for rehearing have been filed by Edwin Gomez, Jonathan Londono, the Attorney General and Reporter,[FN1]

and amicus curiae, Tennessee Association of Criminal Defense Lawyers. The petitioners primarily argue that the majority opinion rests upon a misunderstanding and misapplication of the United States Supreme Court's decisions in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

FN1. The Attorney General seeks rehearing only as to Part III.C of the majority opinion and argues that the Tennessee Criminal Sentencing Reform Act of 1989 ("Reform Act") violates the Sixth Amendment.

The arguments advanced in the petitions to rehear were considered and rejected by a majority of this Court in its original opinion. We remain convinced that *Blakely* must be read in light of *Booker*. To do otherwise would not serve to "preserve Sixth Amendment substance." *Booker*, 125 S.Ct. at 752. In *Booker*, Justice Stevens explained:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges; it is that circumstance that makes the ***673** Court's answer to the second question presented possible. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

Id. at 750 (citations omitted). The Court harmonized the Federal Sentencing Guidelines with the Sixth Amendment by applying in *Booker* a remedy which created a discretionary sentencing scheme. *Id.* at 764. We are not persuaded that the differences between the Reform Act and the post-*Booker* Federal Sentencing Guidelines are constitutionally significant. If the Sixth Amendment countenances a sentencing scheme that permits judges to find facts relevant to sentencing and affords judges discretion to select a sentence anywhere within a statutory range, even in the absence of enhancing facts, we are unable to conclude that the Sixth Amendment forbids a sentencing scheme in which a state legislature limits judicial discretion by designating the presumptive sentence that must be imposed when a judge finds no enhancement or mitigating factors.

The petitions for rehearing are DENIED.

Justice Anderson and Justice Birch continue to adhere to the position stated in the original dissenting opinion, and on those grounds, would grant the petitions to rehear.

Janice M. Holder and William M. Barker, JJ., Concurring.

E. Riley Anderson and Adolpho A. Birch, Jr., JJ., Dissenting.

163 S.W.3d 632

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE
AT NASHVILLE
September 16, 2003 Session

STATE OF TENNESSEE v. EDWIN GOMEZ and JONATHAN S. LONDONO

**Direct Appeal from the Criminal Court
for Davidson County
No. 2001-A-280
Cheryl Blackburn, Judge**

**No. M2002-01209-CCA-R3-CD
Filed February 18, 2004**

The Appellants, Edwin Gomez and Jonathan S. Londono, were convicted by a Davidson County jury of conspiracy to commit aggravated robbery, facilitation of first degree felony murder, facilitation of especially aggravated robbery, and facilitation of aggravated robbery. Gomez and Londono were ordered to serve forty-nine years in the Department of Correction as Range I standard offenders. On appeal, Gomez presents the following issues for our review: (1) whether the trial court erred in not suppressing the photographic line-up

and subsequent in-court identification and (2) whether it was error to permit testimony concerning $19,600 found in Gomez's apartment. Londono argues that: (1) the trial court erred by admitting the statements of Co-defendant Bryant Guartos; (2) the trial court erred by admitting the statements of the victim as either an excited utterance or a dying declaration; and (3) the evidence was insufficient to support the verdicts. Both Gomez and Londono argue that the length of their respective sentences was excessive and that consecutive sentencing was improper. After a review of the record, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

DAVID G. HAYES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

Glenn R. Funk and Cynthia M. Fort, Nashville, Tennessee, attorneys for Appellant, Edwin Gomez; David A. Collins, Nashville, Tennessee, and James Stafford, Houston, Texas, Attorneys for Appellant, Jonathan S. Londono.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Elizabeth B. Marney, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; and Bret Gunn and Roger Moore, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Factual Background:

On March 16, 1999, Carlyle & Company Jewelers, located in the Green Hills Mall of Nashville, had a special showing of approximately 100 to 110 Rolex watches with an estimated value of $750,000. The following day, March 17th, two security guards, Roy Rogers and Eugene Nagele, were

removing the watches from Carlyle & Company in order to transport them to another showing. Nagele exited the mall first in order to inspect a stairwell and elevator area. Rogers began walking to their Jeep, and Nagele "fell in behind him about 25 or 30 feet." Nagele then heard the "sound of running footsteps behind" him. Nagele shouted, "Roy," and "started to duck down and turn, and there was a thump and a shot." After getting a brief glance of a hooded figure and hearing voices speaking in a foreign language, Nagele was struck in the back of his head and lost consciousness for a short time. His Colt pistol, estimated at approximately $1,500, was stolen. When Nagele awoke, he heard Rogers yelling, "Gene, Gene, I've been shot." Rogers twice asked Nagele to "stop the bleeding." Rogers died twenty-one days later of complications from his gunshot wound.

Deborah Sloan arrived at the mall around 9:10 or 9:15 a.m. Ms. Sloan was taking her children "to a Gymboree play

class in the Mall" that morning. She stated that no more than a minute after she pulled her minivan into the parking lot, she "heard a bang, a loud bang, and a lot of running and rustling and things like that." She observed one man lying on the ground, a "second man was sort of on his hands and knees faced away from [her], and then there was three men just running around[.]" She then saw two of the men who were "running around" pick up the steel boxes, which contained the watches, and the third man "lean over beside the man who was lying on the ground and pick up a gun." Further, she observed the men leave the parking lot and drive away in a minivan. She called 911 on her cell phone and remained at the scene until police arrived.

Officer Thales Finchum of the Nashville Police Department was the first to arrive at 9:25 a.m. He found Rogers lying on the ground and recognized that he was "clearly in bad shape." Finchum asked Rogers what

happened, and Rogers responded that the man who shot him was a "mulatto" wearing a dark hood. Ms. Sloan described the assailants as having "dark skin, dark hair, fairly average height and weight as far as size." She also commented that "[t]hey all had on very big baggy clothing and very heavy loose jackets" even though it was a warm day in the middle of March. Sloan estimated that the three men were in their "twenties." She also observed the minivan as being "purplish-maroon color" with "gold lettering and gold trim on the wheels."

Christina Hudson, a mall employee, was in the parking lot on the morning of the robbery. As she was sitting in her car, she observed a dark-skinned male, that she described as either Hispanic or Black, get into the passenger side of a purplish-colored minivan. As the man got into the vehicle, she saw three other people "raise up." She described the other three men as also Hispanic or Black. Ms. Hudson observed three

of the men exit the vehicle, but she did not know about the robbery and shooting until "about an hour afterwards." She was unable to identify any of the men in the van.

Michelle Nicholson was traveling on I-40 a little after 8:00 a.m. on March 17th. While driving, she observed a maroon van with Florida plates "weaving in and out of traffic." Her first observation of the van was "[r]ight at the White Bridge Road exit." She described the four occupants of the vehicle as "all male, Hispanic, dark hair." According to Ms. Nicholson, the van exited on Hillsboro Road, which would "be the way to Green Hills Mall." Later that day, when she heard news reports of the robbery and the description of the van, she called the police department and reported the van she had seen. Nicholson was unable to identify either of the Appellants.

Upon receiving this information from M. Nicholson, Sergeant Freddie Stromatt of the Nashville Police Department

concluded that the suspects "possibly stayed at a motel along the route of I40 west of Nashville, headed out towards Memphis." Stormatt "instructed detectives to go to each motel from the Charlotte Pike exit all the way back to the county line, to check each motel and see if they had any male Hispanics that had been staying in that motel that were driving vans." One of the detectives discovered that male Hispanics driving two vans had stayed at the Howard Johnson Motel at I-40 and Charlotte Pike.

Sue Madan, the manager of the Howard Johnson, told police that the men rented rooms 202 and 204. She provided telephone records for these two rooms. These records identified telephone calls from the motel to two pay telephones, one located inside the mall directly across from Carlyle & Company and the other located outside a restaurant "[a]bout a block-and-a-half" down the street from the mall. These records also showed that calls were placed from the

rooms using several cards. The record for one of the cards showed that calls were placed from the Howard Johnson to Miami on March 15, 1999, then from Alabama to Miami on March 17,1999, and then from Gomez's home telephone number to Bogota, Colombia on March, 18, 1999. Videotapes from the Howard Johnson were also provided to the detectives. Detective Harold Haney of the Nashville Police Department testified that the tapes showed two men at the front desk, a maroon van and a white van in the motel parking lot, and people coming and going from the vans. However, Detective Haney admitted that the tapes were not clear enough to identify any of the individuals.

Robin Capps, a housekeeper at the motel, found a "seat, like that come out of a van" in Room 204. She and another housekeeper removed the seat from the room. The seat was later recovered by the police.

Tiffany Lee Dozier, the Howard Johnson front desk clerk, registered "at least" five Hispanic men in March. She recalled that they had two minivans, one white and the other maroon. She stated that she interacted with one man in particular. He checked the group into the hotel and "was flirting with [her]." According to Dozier, "[h]e spoke very good English." Ms. Dozier was later shown a photo array and identified Co-defendant Bryant Guartos as this man. In addition, Ms. Dozier identified Londono from a pre-trial photo array as the man who "would come to the desk with the guy that spoke English." Ms. Dozier was unable to identify either of the Appellants at trial.

A search of Room 204 was conducted. Detective James Arendall of the Nashville Police Department found a box of ammunition on the top shelf of the closet. The bullet taken from the victim Rogers was consistent with the ammunition found in the motel closet. Following fingerprint analysis, it

was determined that Guartos' fingerprints were on the telephone receiver, Londono's fingerprints were on the ammunition box, and Gomez's fingerprints were on the telephone book.

On July 29, 1999, Detective Norris Tarkington of the Nashville Police Department presented a photo array to Ms. Sloan. Ms. Sloan identified Co-defendant Bryant Guartos as the man who stole the security guard's gun. On October 10, 2000, Detective Tarkington again presented a photo array to Ms. Sloan, and she identified Londono as "the person that I saw pick up the last of the boxes and head back toward their minivan." On this same date, Ms. Sloan was shown a second photo array, and she identified Gomez as "the other man who was carrying boxes." Ms. Sloan identified both of the Appellants at trial and testified that she was "very sure" that they were the two men involved in the crime.

Barbara Franklin, an employee of Carlyle & Company, testified that a Hispanic man came into the store the afternoon before the robbery and was asking questions about the Rolex watches. She later identified this man as Co-defendant Bryant Guartos. She also testified that another man, who spoke "halting" English, accompanied Guartos; however, Ms. Franklin was unable to identify either of the Appellants as the man who accompanied Guartos.

Londono's girlfriend, Julie Jimenez, testified that she was living in Miami with Londono in the Spring of 1999. During that time, Londono left for "[s]even or ten days" but did not tell her where he was going. He told her the purpose for the trip was to make some money. She testified that Gomez, Co-defendant Guartos, Maria Sierra, and another unidentified individual accompanied Londono on this trip. According to Jimenez, the group left in two vans, one white and the other maroon. Londono called Jimenez while he was gone and told

her that he was in Tennessee. She recognized Gomez's voice in the background of this phone conversation. At some point before Londono returned to Miami, he called Jimenez and told her that he wanted to give her a Rolex watch. Upon his return, Londono related the events of the robbery to Jimenez. While he gave a different version of events, he did admit to taking the watches. Thereafter, Londono and Jimenez went on a shopping spree and spent approximately $3,000 on furniture and a television set. According to Jimenez, Londono insisted that she purchase everything in her name. He also gave Jimenez some Nashville postcards.

On April 25, 1999, Detective Gerard Starkey of the Miami Dade Police Department arrested Londono at the Miami Marriott Hotel on unrelated charges. Upon a search of Londono's burgandy van, Detective Starkey found a postcard of the Nashville riverfront area. Thereafter, Detective Starkey located Gomez at his apartment in the

Fontainebleau Hilton Hotel. Upon a search of Gomez's apartment, detectives found $19,600 in cash concealed beneath the kitchen counter above the dishwasher. The detectives also discovered a furniture receipt for $570, dated March 25, 1999, and three money transfer receipts for $6,000, two of which were dated March 23, 1999.

Londono and Gomez were both questioned by the police regarding their involvement in the robbery. The Appellants both denied ever being in Nashville. Co-defendant Guartos was also interviewed and confessed to his involvement in the crime. In Guartos' statement, he said they sold the watches for $230,000 in Miami, and they got $40,000 each. Guartos later denied ever making this statement.

Gomez, Londono, and Guartos[1] were subsequently indicted as follows: Count I, conspiracy to commit aggravated robbery; Count II, felony murder of Roy Rogers;

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[1]Guartos was tried separately and convicted as indicted.

Count III, especially aggravated robbery of Roy Rogers; and Count IV, aggravated robbery of Eugene Nagele. After a trial by jury, Gomez and Londono were convicted of Count I as charged; Count II, facilitation of felony murder as a lesser included offense; Count III, facilitation of especially aggravated robbery as a lesser included offense; and Count IV, facilitation of aggravated robbery as a lesser included offense. Following a sentencing hearing, the Appellants received a total effective sentence of forty-nine years. The Appellants' motions for new trial were denied, and this appeal followed.

ANALYSIS

I. Suppression of Photo Array

Gomez argues that the trial court erred by not suppressing Deborah Sloan's out-of-court photo identification of the Appellant and subsequent in-court identification. Specifically, he contends that "the out of court photo array

was impermissibly suggestive and should have been suppressed but also, further contends that due to the impermissible suggestiveness of the out of court identification, the subsequent in court identification should not have been admitted."

The Appellant's motion to suppress was filed on Thursday, January 31, 2002. A hearing on the motion was held on Friday, February 1, 2002. Argument was presented, but no proof was offered. Trial began on Monday, February 4, 2002. The trial court ruled that the suppression issue was waived for failure to comply with the pre-trial scheduling order. The State contends that the issue is, likewise, waived on appeal. We agree.

Pursuant to Rule 12(b)(3), Tennessee Rules of Criminal Procedure, motions to suppress evidence must be raised "prior to trial." *State v. Davidson*, 606 S.W.2d 293, 295 (Tenn. Crim. App. 1980); *Feagins v. State*, 596 S.W.2d 108,

109-10 (Tenn. Crim. App. 1979). Additionally, this rule provides that "the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing." Tenn. R. Crim. P. 12(c). The failure to present a motion to suppress by the time set by the trial court constitutes waiver, but the trial court may grant relief from the waiver for "cause shown." Tenn. R. Crim. P. 12(f); *State v. Hamilton*, 628 S.W.2d 742, 744 (Tenn. Crim. App. 1981); *Davidson*, 606 S.W.2d at 295. Under this rule, defense counsel travels at peril with an untimely motion unless the record adequately reflects cause for the late filing because he or she has the burden of overcoming the waiver. *See State v. Randolph*, 692 S.W.2d 37, 40 (Tenn. Crim. App. 1985).

A hearing on the motion was held on the Friday before trial was to begin. At the hearing, the following colloquy occurred between the court and defense counsel:

THE COURT: I want to hear you, Mr. Funk, on why I should even entertain these motions. They were filed yesterday, almost at 3:30, somewhere around there. This case has been pending for some period of time. You've been on this case since October, so why should I even hear these motions filed on the eve of trial?

. . .

THE COURT: - - there is no surprise to anybody that there is a photo lineup in this case, and that Ms. Sloan picked out the defendant. I mean, that's been, it was in the first trial. That's been known since day one. I told you when you got in on the case you had better be ready for trial. I wasn't going to put up with delays because of it.

[DEFENSE COUNSEL]: I'm not asking for a continuance, Judge.

THE COURT: Yeah, but you filed a motion, which is an evidentiary issue about suppression of a photo lineup and her in-court testimony, which should have been filed months ago if you expect me to hear it.

[DEFENSE COUNSEL]: I do expect you to hear it.

THE COURT: Why? I guess that is the question. Why? It is too late. You will have to agree it is too late.

. . .

THE COURT: . . . I think the cases say when there is a pretrial scheduling order and you wait until the time of trial, it is too late. You've waived it. That is what they say, and Friday before trial, when there has been months, and you were clearly told that you had to be ready, that it's too late. I mean, mainly because you filed it at 3:30 yesterday.

. . .

THE COURT: . . . The trial starts Monday morning at nine o'clock. When is it that we are supposed to have this hearing.

[DEFENSE COUNSEL]: I'm available any time.

THE COURT: . . . [T]hat is not an appropriate answer, and you know that.

. . .

THE COURT: . . . [E]vidence is going to be introduced in trial about a photo lineup. You've known that since day one; have you not?

[DEFENSE COUNSEL]: That's correct.

A black and white copy of the photo array was provided to the defense during pretrial discovery. The week before

trial was to begin defense counsel requested a color version of the photo array from the State. The motion to suppress challenged this color photo array, asserting that it was "unduly suggestive." At the motion hearing, defense counsel argued "suggestiveness" based upon (1) the fact that the array displayed "OCA" or arrest numbers and (2) the lighting of the Appellant's photograph. In response, the State explained,

> Judge, it was in discovery. [Defense counsel] came down to the office this week because I had the color version. Of course, the copies were in black and white.
>
> Part of what [defense counsel] is complaining about is the copy that I showed . . . , because I was trying to figure out which lineup was Mr. Gomez and Mr. Londono, did have OCA numbers because the detectives keep a copy of that so they will know who is who.
>
> The actual photo lineup used in this case is like all the others. They do not have OCA numbers or arrest numbers on any of them. The detective testified to all that in [Co-defendant Guartos'] trial. There is no issue about the OCA numbers or any identifying marks with regard to the photos.

Moreover, we emphasize, as noted by the State, "[N]obody asked to see it to begin with, the color version, until this week, but the black and white version has been in discovery response from the very b ginning." The State then informed the court that it would not be introducing the line-up with the OCA numbers into evidence. Defense counsel withdrew his objection to the line-up on the basis of the OCA numbers and argued that the line-up was suggestive because it was "taken in a different light. . . . [T]he color version has him stand out in a way that is not appearing in the black and white." Regarding the lighting of the photo array, the trial court observed, "I've looked at this photo. This is the color photo, and interestingly enough, the lighting on all of them appears to be a little different. . . . There is nothing in this photo spread that would point to any one, any particular one other than any of the others[.] . . ."

Nonetheless, the trial court was unable to fully develop the suppression issue without the testimony of Ms. Sloan, the witness who identified the Appellant from the photo array, and Detective Tarkington, the officer who showed Ms. Sloan the photo array. Thus, the trial court entered piece-meal findings as the trial progressed and the proof developed.[2] The

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[2] After Deborah Sloan testified at trial, the trial court found:

> I listened to the proof about the photo lineups and the photo presentation and find that they were neither suggestive nor whatever, so whatever your motion was, I would have ruled against you. Clearly, all the questions you had went toward cross-examination, not admissibility, so just so it is clear in the record that I would not have suppressed either the photo lineup or the lineup in court.

A violation of due process has occurred if the identification procedure is so suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Neil v Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 381 (1972); *see also Bennett v. State*, 530 S.W.2d 511, 512-15 (Tenn. 1975). Second, if the identification was unduly suggestive, the court must determine, under the totality of the circumstances, whether the identification is nevertheless reliable. *Neil v. Biggers*, 409 U.S. at 199; 93 S. Ct. at 382.

In the instant case, the record clearly supports the trial court's finding that the photo identification procedure was not unduly suggestive. Ms. Sloan had a sufficient opportunity to view the Appellant at the time of the crime and, because of the nature of the crime, Ms. Sloan had a high degree of attention at the time of the incident. There was no evidence or

(continued...)

trial court correctly concluded that the Appellant had the information within his control and could have filed an appropriate motion in a timely fashion. Under these circumstances, the Appellant's failure to timely file the motion to suppress as required by the trial court's scheduling order constituted waiver of the right to complain about introduction of the photo array and subsequent in-court identification. Tenn. R. Crim. P. 12(f). At the hearing, defense counsel claimed that "[w]e get sent a black and white copy that does not accurately reflect the color copies that are going to be presented at trial, and then that is a surprise to us a week before trial. . . . They are not supposed to provide us with misleading things. . . ." This claim is without merit. The black and white copy did not prevent defense counsel

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[2](...continued)
argument presented that the procedure conducted by Detective Tarkington was suggestive in any way. The photographic arrays depicted Hispanic individuals with very similar facial characteristics, hair color, and hair length. Therefore, we conclude that this issue is without merit.

from investigating the case, including requesting a color copy prior to the week before trial. In this case, no threshold showing of good cause for the Appellant's failure to make a timely motion is shown or even suggested.

We are mindful that sanctions for violation of a local or state court procedural rule should not work an undue hardship upon the litigants. In this respect, trial courts should look to the actual or potential prejudice flowing from the violation in considering the course of action to take. *See, e.g., State v. Garland*, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981). Primary purposes of Rule 12(b)(3), which requires filing prior to trial, relate to avoiding interruption and inefficiency in jury trials and to providing the State an opportunity to appeal an adverse ruling while keeping its chance of a successful prosecution if the ruling is overturned. *Feagins*, 596 S.W.2d at 110. It is apparent that the trial court found no just cause for the untimely filing and no just cause to grant relief from

the waiver. We believe that the record contains material evidence to support the trial court's discretionary action.

II. Money found in Gomez's Apartment

Gomez argues that "it was abuse of the trial court's discretion to allow the testimony of [Miami Police] Officer Starkey relating to the $19,600.00 cash seized from the [Appellant's] apartment in that there was no foundation laid to cause that cash to be relevant to the Rolex robbery which was the subject of this trial." His challenge is two-fold. First, the Appellant argues that the State violated discovery Rule 16, Tennessee Rules of Criminal Procedure. Second, he contends that the cash seized from his Miami apartment was connected to a diamond robbery in Texas and, therefore, its admission constituted impermissible evidence of "other crimes, wrongs, or acts" within the meaning of Rule 404(b), Tennessee Rules of Evidence.

Prior to trial, the Appellant filed a *motion in limine* to prohibit "the prosecution from introducing any evidence or testimony of a search conducted of the Fontainebleau Towers, Apartment 117 Miami Florida." This motion was denied as being untimely. However, discovery responses from the State concerning the items discovered in the apartment did not include any mention of the $19,600 seized. After trial had commenced, the State, after speaking with Detective Starkey, who conducted the search of the Appellant's apartment, became aware that this sum of cash was also discovered in the kitchen cabinet area above the dishwasher. The State promptly informed defense counsel of the information. Defense counsel objected to any testimony regarding the money. The State responded that it only intended to introduce the testimony of the detective as to what he saw in the apartment and did not intend to introduce any physical evidence of the money. The State explained, "[T]he items

that were seized from [the Appellant's] apartment came from the FBI and the money was not listed anywhere in their list of items. I think that is probably because the Miami Police Department seized the money and went ahead with proceedings against the money."

During a jury-out hearing, Detective Starkey testified that, on April 26, 1999, he went to the Appellant's apartment to serve a warrant for a diamond robbery in Texas. The Appellant was arrested outside the "entry way to his door." Thereafter, the Appellant gave consent to search the apartment, and a sum of cash in the amount of $19,600 was found "[i]n the kitchen area, up above the dishwasher." The detective further testified that the Appellant did not acknowledge ownership of the cash and that he did not "know whether the cash in this apartment had anything to do with the diamond case as opposed to the Rolex watches case." He

also stated that there were indications that three people lived in the apartment.

Following Detective Starkey's testimony, defense counsel again objected to testimony concerning the money, arguing that:

> Officer Starkey can testify about all of the items that were listed in the discovery response. With regards to the money at issue here, I would still maintain that he should not be allowed to testify about money, one, on the grounds that it violates the discovery rules. Obviously, I understand the Court's point that, well, Mr. Gomez knew about the money because he was present when the money was taken and he apparently was served some papers while he was in jail, but that doesn't indicate that that money had anything to do with this case, and for this to all of a sudden whipsaw back on him in the middle of trial and have the State argue that it does have something to do with this case hindered my ability to prepare for this case.
>
> In addition, Judge, I would also say that given that the actual arrest in this case was dealing with a diamond theft that happened closer in time to April 26, '99, than the events in this case, then what we have is proof from one case being introduced as proof on the second case and the only way - - and there is no real way to keep these two separate if you allow the testimony.

Following argument by the State, the trial court ruled:

> All right, well, first of all, I do find that information is sort of subject to the discovery rule; however, as soon as the State became aware of [the evidence, they] advised defense counsel. What I was trying to determine and the reason I wanted to hear was whether or not [the Appellant] had any knowledge of the money, which is clear from the testimony that he did, so that whatever violations there were, it was only compounded by the fact that apparently [the Appellant] didn't tell his attorney, so I'm going to allow the testimony. Clearly, obviously, there is not going to be anything about the diamond situation in Texas.
>
> Back to your issue about the fact it could be proceeds from another crime, well, I don't know that. Maybe, maybe not. It is just hard to say, but I don't think the State has any firm proof. If, in fact, they knew clearly that this was proceeds from another crime, I might buy your argument, but I don't hear any information that would lead me to believe that.
>
> . . .
>
> All right. Now obviously, you are going to be free to question or if you want to put on proof that it came from something else, I guess you can, I mean, I know that is not going to be reasonable, but there is not enough proof in this record from the testimony for me to determine that wasn't involved in this, because it is close in time after this case. There is an awfully lot of, seven-hundred-fifty-thousand dollars ($750,000.00) worth of Rolex [watches] taken, plus

> there is going to be some statements introduced in evidence, and in fact, they got [two-hundred-thirty-thousand dollars ($230,000.00)] for this, so overrule your objection.

Defense counsel then stated for the record:

> This is precisely what Rule 16 deals with. Had I known that this money was going to be charged to this crime, I could have gone and gotten the records from Texas, found out what the Texas authorities have already attributed this money to the diamond crime. [The Appellant] has already pled guilty in Texas to that crime, and if that is a substantive part of their proof that this money was part of that crime, then I'd be able to show that, and then that would prevent you from letting this in, but I haven't had the opportunity to present that evidence or even investigate that.

The court observed, "Just because Texas authorities might have been arguing that would not necessarily preclude Tennessee authorities from arguing that."

A. Discovery Violation

Rule 16(c), Tennessee Rules of Criminal Procedure, requires:

> If, prior to or during trial, a party discovers additional evidence or material previously requested

> or ordered, which is subject to discovery or inspection under this rule, the party shall promptly notify the other party or the other party's attorney or the court of the existence of the additional evidence or material.

Both the State and a defendant have a continuing duty to disclose evidence previously requested and subject to discovery under Rule 16. Tenn. R. Crim. P. 16(c). When arguing that the State violated Rule 16, a defendant bears the burden of showing "the degree to which the impediments to discovery hindered trial preparation and defense at trial." *State v. Thomas Dee Huskey*, No. E1999-00438-CCA-R3-CD (Tenn. Crim. App. at Knoxville, June 28, 2002) (quoting *State v. Brown*, 836 S.W.2d 530, 548 (Tenn. 1992)). In *State v. Brown*, 552 S.W.2d 383, 386 (Tenn. 1977), our supreme court noted with approval the ABA Standards Relating to Discovery and Procedure Before Trial; § 2.4 (prosecuting attorney charged only with using "diligent good faith efforts" to obtain discoverable material or information from other governmental personnel). Furthermore, the trial court should

refrain from excluding evidence for noncompliance with discovery rules "except when it is shown that Defendant is actually prejudiced by the st te's failure and the prejudice cannot be otherwise eradicated." *Thomas Dee Huskey*, No. E1999-00438-CCA-R3-CD (quoting *State v. Payne*, 791 S.W.2d 10, 16 (Tenn. 1990)). The Appellant gave consent to search the apartment and was present when the money was found. Also, he had been served with a seizure petition for the money. The State explained why the evidence had not been discovered earlier and immediately disclosed the information to defense counsel. Accordingly, we agree the trial court's ruling admitting this evidence as we find compliance with this rule. *See also* Tenn. R. Crim. P. 16, Note 22.

B. Character Evidence

Admissible proof must satisfy the threshold determination of relevancy mandated by Tennessee Rule of Evidence 401,

which defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 403 adds that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. Finally, Rule 404 deals with "character evidence." Subsection (b) of this rule provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b).

Contrary to the assertion of the Appellant, Detective Starkey, in his testimony before the jury, did not mention the Texas diamond theft. Rather, the jury was only told that

$19,600 had been discovered in the Appellant's apartment. Thus, the jury was not exposed to evidence of other crimes, wrongs, or acts reflecting the Appellant's character as controlled by Rule 404(b). Regarding the relevancy of the cash, the Appellant's argument that the money was not relevant because it represented the proceeds of the diamond theft is, likewise, without merit. An issue of consequence before the jury in this case was whether the Appellant had the intent to benefit in the proceeds or results of the offense. Evidence of the money found in the Appellant's apartment was relevant to establish intent to benefit in the proceeds or results of the offense. Based upon the facts of the case, we conclude, as did the trial court, that the jury could infer that the money located in the Appellant's apartment was the proceeds of the Rolex theft. To determine otherwise would prevent introduction of a large sum of cash when an Appellant commits numerous thefts and allow him to benefit

from further criminal activity. Additionally, absent any proof to the contrary, we fail to see how Texas would be better equipped to link a sum of cash to one robbery as opposed to another.[3] The reason the Appellant was in possession of the money is a jury question. Accordingly, the trial court properly admitted the evidence. Furthermore, we conclude that, even if admission of the money was error, such error was harmless and without prejudicial impact upon the jury due to the fact that the Appellant was convicted of facilitation and, thus, the jury determined that the State had not proven he

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[3]At the motion for new trial hearing, defense counsel presented the court with the Appellant's file from the federal public defender's office in the southern district of Florida. The Appellant contended that the file established that the"$19,600 was tied to the theft of the diamonds." However, the file only states, "Gomez consented to a search of the apartment where he was staying and they found the black bag that had the diamonds in it, $19,600 cash, and 2 suitcases full of $34,000 worth of stolen glasses[.]" The Appellant pled guilty to the diamond theft. As noted by the trial court, "I guess if there was a trial and that money was introduced and was linked directly to that, you might have a different issue. But the mere fact that the $19,600 is found," does not preclude "that it's related to the theft of the watches from Carlyle & Company." We agree with the conclusion of the trial court.

had the intent to benefit in the proceeds or results of the offense. *See* Tenn. R. Crim. P. 52(a).

III. Co-defendant Guartos' statements

Londono argues that "the trial court erred in admitting the statements attributed to Co-defendant Guartos." In order to establish the existence of a conspiracy, the State moved prior to trial to declare Guartos unavailable as a witness and admit his redacted statements as statements against penal interest, under Tennessee Rule of Evidence 804(b)(3), at the trial of the Appellants. The trial court reserved ruling on the motion until further testimony was developed at trial.

Bryant Guartos was apparently the first to be apprehended and, according to the Appellant, the State elected to sever his case and proceed to try him separately. He was convicted of first degree felony murder, conspiracy to commit aggravated robbery, especially aggravated robbery, and aggravated robbery. His case was on appeal at the time the Appellants

went to trial. During a jury-out proceeding, Guartos advised the court that he would exercise his Fifth Amendment privilege against self-incrimination. He was not called to testify. At trial, Detective Tarkington testified that, during his investigation of this case, he interviewed Guartos on March 19, 2000. At trial, Tarkington testified to the following redacted version of Guartos' statements:

> He stated that he and the others were in Nashville. They stayed at the Howard Johnson's and they were, they came to Nashville in two rented vans. One was a wine color or red color and the other one was white, and they took the seat out of one of the vans because they needed more room, and he stated they sold the watches for two-hundred-thirty-thousand dollars ($230,000.00) in Miami, and his proceeds from that, his take of that was forty-thousand dollars ($40,000).[4]

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[4]This statement was redacted by the State to be inculpatory only in nature. Guartos' original statement as transcribed by Detective Tarkington at the time of the interview reads:

> He stated, "I was there. Maria was there. He named Jonathan, and Chato (Edwin Gomez), Javier as the shooter, and an old man known as Mosquito as the driver of the wine colored van. He stated they used two rented vans which they got from someone in Miami for $2500.00. One of the vans was, "wine colored or red.

(continued...)

Detective Haney traveled with Detective Tarkington to Miami and participated in the interview with Guartos. Detective Haney also testified as to the contents of Guartos' statements. The trial court ruled that the Guartos' statements were admissible, finding that:

> [O]ne of the issues I have to look at is whether or not Mr. Guartos, when he gave this statement, which was against his penal interest, and that a person reasonably situated in his position would have known it. Now that is how it is relevant. . . . The issue is whether or not he really understood that this was going to be to his detriment and that he also just wasn't trying to shift blame.

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[4](...continued)
The other was white." He admitted they stayed at the Howard Johnson Motel and used two rented rooms while in Nashville. He stated he and Maria were in the wine colored van. According to Guartos the others were in the white van. He stated he and Maria took the seat out of the white van at the motel because they needed more room. Later he stated his fingerprints should not have been found on the seat. We asked why and his reply was they (others) wiped it off. He stated they got $230,000.00 for the watches when they were sold in Miami. He stated he used his $40,000.00 to buy his home in Miami.

We note that, within this statement, a sentence has been "blacked-out" from the copy provided to this court and is, thus, illegible.

> Now as I see what [the State] is proposing really does not necessarily implicate the defendants at all and with the prior - - okay, this is what I'm going to rule. I'm going to rule with that . . . this statement can come in.

After each time the statement was testified to in the presence of the jury and in the written jury charge, the trial court provided a cautionary instruction. The following instruction was provided to the jury in the written charge:

> You have heard testimony about statements which were alleged to have been made by Bryant Guartos, and give it such weight, if any, as you believe it deserves. However, you may only consider these statements on the issue of whether the conspiracy charged in Count One existed. You may not consider this evidence in determining whether a particular defendant joined in the charged conspiracy.

A. Statement Against Interest

Rule 804 of the Tennessee Rules of Evidence provides, in pertinent part, as follows:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .

> (3) Statement Against Interest. - A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The Advisory Commission Comments to the rule state that "this rule follows modern Tennessee law by admitting declarations against penal interest as well as those against pecuniary or proprietary interest."

We find no error by the trial court in admitting the statements of Bryant Guartos over objection by the defense. *See State v. Nathan Alex Weaver*, No. M2001-00873-CCA-R3-CD (Tenn. Crim. App. at Nashville, Apr. 15, 2003). Guartos was clearly an unavailable witness, *see* Tennessee Rule of Evidence 804(a), and, because Guartos admitted to Detectives Tarkington and Haney that he came to Nashville with others in two vans, white and wine-colored, stayed at the

Howard Johnson, and they got $230,000 for the watches from the robbery, the contested statements clearly implicate Guartos in a crime. Furthermore, we note that Guartos was convicted of the crimes for which the Appellants are currently on trial. We therefore conclude that Guartos' statements were admissible pursuant to Rule 804 of the Tennessee Rules of Evidence as statements against interest.

B. Confrontation Clause

Thus, we turn to the substance of the statement to determine its admissibility. *See Nathan Alex Weaver*, No. M2001-00873-CCA-R3-CD. On its face, Guartos' statements qualify as statements against interest because, through his admissions, he exposed himself to liability for multiple criminal charges. However, our inquiry is not ended as we must move from the technical analysis of the rules to the broader analysis of the constitutional implications. *People v. Farrell*, 34 P.3d 401, 405 (Colo. 2001); *Nathan Alex Weaver*,

No. M2001-00873-CCA-R3-CD. The Confrontation Clause of the United States Constitution guarantees a criminal defendant the right to confront witnesses against him or her. U.S. CONST. amend. VI; *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110 (1974). This right is also protected by the Tennessee Constitution. TENN. CONST. art. I, § 9. The right of confrontation encompasses the right to cross-examine. *Barber v. Page*, 390 U.S. 719, 721, 88 S. Ct. 1318, 1320 (1968). It is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis*, 415 U.S. at 316, 94 S. Ct. at 1110. The right to confront and cross-examine is not absolute however, and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046 (1973). Reliable hearsay which comports with an exception to the hearsay rule does not violate a defendant's confrontation

rights. *State v. Causby*, 706 S.W.2d 628, 631 (Tenn. 1986) (citing *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539 (1980)); *see also State v. Kennedy*, 7 S.W.3d 58, 65 (Tenn. Crim. App. 1999). Such statements are deemed "so inherently trustworthy that adversarial testing would add little to their reliability." *Kennedy*, 7 S.W.3d at 66. To meet that high burden of truthfulness, the statement must either (1) fall within a firmly rooted hearsay exception or (2) bear particularized guarantees of trustworthiness. *Ohio v. Roberts*, 448 U.S. at 66, 100 S. Ct. at 2539.

1. Firmly Rooted Hearsay Exception

The first question for our consideration is whether the statements made by Bryant Guartos fall within a firmly rooted hearsay exception. *Nathan Alex Weaver*, No. M2001-00873-CCA-R3-CD. We have affirmed the trial court's ruling that the statements made by Guartos to Detectives Tarkington and Haney were statements against penal interest.

Tenn. R. Evid. 804(b)(3). We must thus address whether statements against penal interest qualify as a firmly rooted hearsay exception. A co-defendant's confession given during a custodial interrogation may be motivated by the co-defendant's desire to minimize his own culpability by implicating the accused and, therefore, courts should view the statement with special suspicion. *Farrell*, 34 P.3d at 406; *see also Lilly v. Virginia*, 527 U.S. 116, 131-32, 119 S. Ct. 1887, 1897-98 (1999). A "statement against interest by a co-defendant made during custodial interrogation does not fall within a firmly rooted hearsay exception." *Farrell*, 34 P.3d at 406 (quoting *Stevens v. People*, 29 P.3d 305, 313 (Colo. 2001.)) Because Guartos is a co-defendant, who made statements against interest in the course of a custodial interrogation, his statements cannot be classified as falling under a firmly rooted exception to the hearsay rule. *Nathan Alex Weaver*, No. M2001-00873-CCA-R3-CD.

2. Guarantees of Trustworthiness

Accordingly, we turn to the question of whether Guartos' statements possess sufficient guarantees of trustworthiness to be admissible under the reliability requirements of the Confrontation Clause. *Lilly*, 527 U.S. at 135, 119 S. Ct. at 1899; *Roberts*, 448 U.S. at 66, 100 S. Ct. at 3529. In *State v. Henderson*, 554 S.W.2d 117 (Tenn. 1977), the Tennessee Supreme Court reviewed the standards for determining when an out-of-court statement satisfies a defendant's confrontation rights under both the United States and the Tennessee Constitutions. The court stated that at least three criteria must be met in order to satisfy the Confrontation Clause: (1) the evidence to be presented must not be "crucial" or "devastating," (2) the State must make a good faith effort to secure the presence of the person whose statement is to be offered against the defendant, and (3) the evidence offered

under a hearsay exception must bear its own "indicia of reliability." *Henderson*, 554 S.W.2d at 119-20.

The first prong of the test requires that the evidence to be admitted must not be "crucial" or "devastating." Evidence is deemed "crucial" if it constitutes an essential element of the crime. *Henderson*, 554 S.W.2d at 119; *Kennedy*, 7 S.W.3d at 65. In this case, the statements were offered to prove that a conspiracy existed, but the jury was instructed that they could not consider the statements "in determining whether a particular defendant joined in the conspiracy." Thus, the statements were not an essential element of the crime and did not constitute "crucial" or "devastating" evidence. The second prong of the test requires the State to make a good faith effort to secure the presence of the declarant. In this case, Guartos stated in court that he would assert his Fifth Amendment privilege if called to testify. The State fulfilled its duty with regard to the second prong.

Finally, the *Henderson* test requires that the evidence to be admitted bear its own "indicia of reliability." To determine whether the statement bears its own "indicia of reliability," the following factors should be considered: (1) whether the statement was truly self-inculpatory; (2) whether the statement was detailed; (3) whether police officers threatened or coerced the defendant to make the statement; (4) whether the confession was offered in exchange for leniency; (5) whether the declarant was likely to have personal knowledge of the events in the statement; (6) whether the declarant made the statement shortly after the described events; (7) whether the declarant had a reason to retaliate against the defendant; and (8) whether the declarant was mentally or physically unstable at the time of the confession. *Farrell,* 34 P.3d at 406-07. The statement as redacted was truly self-inculpatory. Guartos understood that the giving of the statement was detrimental to him. He

accepted direct culpability, did not try to minimize his own involvement, and was not merely trying to shift the blame. Moreover, it was detailed. The statement describes the various crimes and sequence of events at a level that would be difficult to fabricate. Guartos specified the amount of his share in the robbery and described the two vans that the group used in effectuating the robbery. Detective Tarkington described the interview process as "very calm" and testified that he did not make any promise of leniency in exchange for the confession. Guartos confessed to his involvement in the crimes and named other individuals who participated in the robberies. He expressed no animosity towards anyone. Additionally, Detective Tarkington testified that Guartos did not appear to be under the influence of any intoxicant or exhibit any strange behavior.

Thus, we conclude that, although the statement does not fall into a firmly rooted hearsay exception, it was nonetheless

supported by sufficient guarantees of trustworthiness to support its admissibility under the Confrontation Clause. The three prongs of the *Henderson* test were satisfied. The trial court, after considering all relevant factors and cautioning the jury about the use of the statements, properly admitted Guartos' statements at the trial of the Appellants.

IV. Admissibility of Rogers' statements

The Appellant contends the trial court erred by allowing the deceased Rogers' inadmissible hearsay statement into evidence at trial. He asserts that the statement did not qualify as either an excited utterance, Tennessee Rule of Evidence 803(2), or a dying declaration, Tennessee Rule of Evidence 804(b)(2). We disagree.

Officer Finchum was the first police officer to arrive at Green Hills Mall after the robbery and shooting. Upon arrival Officer Finchum observed the victim, Roy Rogers, lying in the parking lot with a "bullet hole in his chest."

According to Officer Finchum, Rogers looked "ashen[.] . . . He was clearly in bad shape." Officer Finchum further testified:

> Well, again, he was laying down on his back. He had a bullet hole in his chest, what appeared to be a bullet hole. . . . I immediately asked him what had happened at that point in time, because it looked like he was kind of fading pretty quick on me and I wanted to get as much information as I could from him as quick as I could, and so I asked him, I said, you know, what happened, you know, and I said who shot you? He said it was a man, a mulatto. He said he had on a dark hood. . . . I asked him a couple more questions and I saw I really wasn't going to get anything more out of him. I again called the dispatcher and told them to have that ambulance step it up.

Rogers died twenty-one days later from complications from his gunshot wound. The Appellant had previously objected to the testimony about the assailant being "mulatto."

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801. Hearsay statements, in general, are inadmissible.

Notwithstanding, the reliability and circumstantial guarantees of trustworthiness of certain nontestimonial statements have permitted courts to carve out various limited exceptions to the hearsay rule.

The rules of evidence provide for an excited utterance exception to the hearsay rule. Tenn. R. Evid. 803(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Tenn. R. Evid. 803(2); *see also State v. Gordon*, 952 S.W.2d 817, 819 (Tenn. 1997). In order for a statement to qualify as an excited utterance, (1) there must be a startling event or condition, (2) the statement must relate to the startling event or condition, and (3) the statement must be made while the declarant is under the stress or excitement from the event or condition. *Gordon*, 952 S.W.2d at 820. The underlying theory of this exception is that circumstances may produce a condition of

excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *State v. Land*, 34 S.W.3d 516, 528-29 (Tenn. Crim. App. 2000). "The ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication." *State v. Smith*, 857 S.W.2d 1, 9 (Tenn. 1993) (citations omitted). Moreover, "it is well established that trial courts have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of that discretion." *State v. McLeod*, 937 S.W.2d 867, 871 (Tenn. 1996) (citations omitted).

In the instant case, being robbed at gun point and shot in the chest undoubtedly qualified as a startling event. Additionally, the statement was made shortly after the event.

Officer Finchum arrived on the scene minutes after the robbery and shooting occurred. The statement related to the identity of the assailant. Furthermore, Officer Finchum described Rogers as "ashen," "in bad shape," and "fading pretty quick." Based upon these facts, we conclude that the statement was made while Rogers was under the stress of being robbed and shot. Accordingly, the statement qualified as an excited utterance, and the trial court did not abuse its discretion by admitting the statement.

The trial court also considered admission of Rogers' statement as a dying declaration and, "as a matter of caution," submitted an instruction to the jury in that regard. *See* 7 TENNESSEE PRACTICE, TENNESSEE PATTERN JURY INSTRUCTIONS – CRIMINAL § 42.15 (Comm. of the Tenn. Judicial Conference 5th ed. 2000). Tennessee Rule of Evidence 804(b)(2) provides the circumstances that allow for the hearsay rule exception known as a dying declaration: "In

a prosecution for homicide, a statement made by the victim while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death." There are four preliminary facts that must be proven prior to admitting a hearsay statement under the exception for a dying declaration: (1) the declarant must be dead, (2) the statement must be admitted only in a homicide prosecution in which the declarant is the victim, (3) the statement must concern the cause or circumstances of death, and (4) the declarant must have spoken or written the statement under the belief that death was imminent. *See* NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE, § 8.35[2] (4th ed. 2000). The last provides the indicia of reliability and truth that justifies admission of the statement. *Id.*

During trial, the trial court ruled, "I will also again instruct the jury about a dying declaration which will tell

them about how they are to receive that because I think from what he testified to about him being ashen, being shot in the chest, knew he was in grave condition, from Officer Finchum's testimony, that that would qualify[.] . . ." This court has previously held that it is not necessary that the declarant state unequivocally a belief that death is imminent. *State v. Maruja Paquita Coleman*, No. 01C01-9401-CR-00029 (Tenn. Crim. App. at Nashville, July 31, 1997). "Awareness of impending death has been inferred from the language and condition of the declarant, the facts and circumstances surrounding the statement, and medical testimony concerning the seriousness of the victim's condition." *Id.* (citations omitted). Importantly, it is not necessary that the victim die shortly after making the statement to qualify for the hearsay exception as a dying declaration if the requirements of the rule are satisfied. *Id.* The law requires only that the declarant believed death was

"imminent;" proof that the dying declarant believed that death would come within a specified number of hours or minutes is not reasonable. One authority states that the rationale for this exception is that one facing imminent death will be truthful for fear of "eternal consequences." COHEN, § 8.35[2]. Clearly, the declarant's *belief* is the crucial factor.

The Appellant contends that there was no proof that Rogers had the requisite belief in his own imminent death. We disagree. According to the medical report, the cause of death was determined to be complications from a gunshot wound to the chest. Mr. Nagele testified that the victim yelled, "Gene, Gene, I've been shot, I've been shot" and that he kept saying, "stop the bleeding, stop the bleeding." The testimony of Officer Finchum indicated that Rogers believed he was gravely injured. According to Dr. Thomas Deering, a foresenic pathologist, Rogers would have died "within minutes to hours" had he not received medical attention

because his injuries were severe and "the bleeding would have been fairly extensive." Given the facts, Rogers' belief that his death was imminent can be readily inferred. Since the evidence supports the trial court's conclusion that the victim was aware of his impending death at the time he made the statement to Officer Finchum, we cannot say that the trial court abused its discretion by admitting Rogers' statement as a dying declaration. The Appellant is not entitled to relief on this issue.

V. Sufficiency of the Evidence

Londono argues that the evidence introduced at trial was insufficient to support his convictions for conspiracy to commit aggravated robbery, facilitation of the first degree felony murder of Roy Rogers, facilitation of the especially aggravated robbery of Roy Rogers, and facilitation of the aggravated robbery of Eugene Nagele. Specifically he is contending that the evidence is insufficient because Deborah

Sloan's identification, Tiffany Dozier's identification, and the fingerprint evidence are unreliable.

A jury conviction removes the presumption of innocence with which a defendant is cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Likewise, it is not the duty of this court to revisit questions of witness credibility on appeal, that function being within the province of the trier of fact. *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. 1999); *State v. Burlison*, 868 S.W.2d 713, 719 (Tenn. Crim. App. 1993). Instead, the Appellant must establish that the evidence presented at trial was so deficient that no reasonable trier of fact could have found the essential elements of the offense

beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

The following definitions are pertinent to the convictions for which the Appellant was convicted. First degree felony murder is defined as the "killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery[.]" Tenn. Code. Ann. § 39-13-202(a)(2) (2003). Robbery is defined as "the intentional or knowing theft of property from

the person of another by violence or putting in fear." Tenn. Code Ann. § 39-13-401(a) (2003). Robbery is aggravated when it is "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon[.]" Tenn. Code Ann. § 39-13-402(a)(1)(2003). Additionally, robbery becomes especially aggravated when it is accomplished with a deadly weapon and the victim suffers serious bodily injury. Tenn. Code Ann. § 39-13-403(a) (2003). The Appellant was convicted of facilitation of these crimes. To support a conviction for facilitation, it must be shown that an accused (1) knew another person intended to commit a specified felony, (2) but without the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense, (3) knowingly furnished substantial assistance in the commission of the felony. Tenn. Code Ann.

§§ 39-11-402(2), -403(a) (2003). Finally, the Appellant was also convicted of conspiracy to commit aggravated robbery:

> [I]f two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense.

Tenn. Code. Ann. § 39-12-103(a) (2003).

In the light most favorable to the State, the proof established that, on March 17, 1999, Rogers and Nagele were removing approximately $750,000 worth of Rolex watches from Carlyle & Company Jewelers, when they were robbed of the watches and Rogers was mortally wounded. The assailants also took Nagele's Colt pistol. Nagele was unable to identify any of the attackers but testified that they spoke in a foreign language. Deborah Sloan, an eyewitness, saw the aftermath of the shooting and the circumstances surrounding the robberies. She described the three men as having "dark skin, dark hair, fairly-average height and weight." Further,

she stated that the men were in their twenties and they drove away in a "purplish-maroon color" van. Ms. Sloan later identified Gomez, Londono, and Guartos as the assailants. She also identified Londono and Gomez at trial. Following an investigation, it was determined that the assailants stayed at a Howard Johnson Motel on Charlotte Pike. A motel employee, Tiffany Lee Dozier, identified Gomez and Londono from photographic arrays. Fingerprints taken from the hotel matched those of the Appellants. Additionally, ammunition found in the motel closet was consistent with the bullet which struck the victim Rogers. Also, phone records from the motel showed calls to pay phones in the Green Hills Mall. Londono's girlfriend, Julie Jimenez, testified that Londono related the events of the robbery to her and that he stated he wanted to give her a Rolex watch. While he gave a different version of events, he did admit to Jimenez that he took the watches. Upon a search of Londono's burgundy van

in Miami, detectives found a postcard of the Nashville riverfront area. Additionally, upon a search of Gomez's Miami apartment, detectives found $19,600 in cash concealed beneath the kitchen counter. In Guartos' statement, he said they sold the watches for $230,000 and they got $40,000 each.

The determination of the weight and credibility of the testimony of witnesses and reconciliation of conflicts in that testimony are matters entrusted exclusively to the trier of fact and not this court. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Likewise, the credibility of eyewitness testimony identifying the accused as the perpetrator of the criminal offense for which he stands trial is a question of fact for the determination of the jury upon consideration of all competent proof. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App.1993). The credible testimony of one identification witness is sufficient to support a conviction if

the witness viewed the accused under such circumstances as would permit a positive identification to be made. *Id.* at 87-88. Despite any conflicts within the proof at trial, as the arbiters of the credibility of the witnesses, the jury chose to accredit the testimony of the State's witnesses and reject the claims of the Appellant. The Appellant has had his day in court. This court may not reevaluate the evidence or substitute its inferences for those drawn by the trier of fact from the evidence. *Cabbage*, 571 S.W.2d at 835. The proof introduced at trial is legally sufficient to support the Appellant's convictions. Accordingly, we find that this issue is without merit.

VI. Sentencing

Following a sentencing hearing, both Appellants, as Range I standard offenders, received respective sentences of six years for their convictions for conspiracy to commit aggravated robbery, twenty-five years for their convictions

for facilitation of first degree felony murder, twelve years for their convictions for facilitation of especially aggravated robbery, and six years for their convictions for facilitation of aggravated robbery. These sentences were ordered to be served consecutively to one another. Londono's sentences were also ordered to be served consecutively to his federal sentence for theft of diamonds and his Texas sentence for manslaughter. This was the maximum sentence permissible for both Appellants. Both Appellants contend that the trial court improperly applied enhancement factors and erred in imposing consecutive sentencing.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is

"conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. When conducting a *de novo* review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing alternatives, if so eligible; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the Appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-102, -103, -210 (1997); *Ashby*, 823 S.W.2d at 168. Furthermore, we emphasize that the Appellant bears the burden of showing that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments (2003).

A. Length

In determining the Appellants' sentences, the trial court considered three enhancement factors: (1) The Appellants have a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2) The Appellants were leaders in the commission of the offense involving two or more criminal actors; and (3) The Appellants possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense. Tenn. Code Ann. § 40-35-114(1), (2), (9) (1997).[5]

The trial court applied enhancement factor (1) to all of the Appellants' convictions and gave this factor great weight. Gomez does not challenge the use of this enhancement factor; however, Londono does, arguing that this factor "should not

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[5]We note that, because of recent renumbering of the enhancements factors under this section, the correct enhancement numbers are now (2), (3), and (10). *See* Tenn. Code Ann. § 40-35-114 (2003).

have been applied since the criminal behavior used occurred after the commission of the offense for which he stands convicted." The Appellant's criminal history includes a conviction for "Theft from Interstate Shipment, April 14, 1999, United States District Court, Northern District of Texas, Ft. Worth Division."[6] Londono's history also includes a conviction for "Manslaughter, April 12, 2000, Houston, Texas, Criminal Court." The trial court noted, "[F]or enhancing factors, factor number one, isn't there all kinds of case law that says it doesn't even have to be convictions, but that the behavior can occur after the crime." Defense counsel conceded that there was substantive case law contrary to his position but, nonetheless, argues on appeal, without any citation to case law, that application of this factor amounts to "an *ex post facto* type situation." This court has previously

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[6]Neither of these convictions are contained in the presentence report; however, they were provided by the State in its "Notice of Intent to Use Convictions or Prior Bad Acts for Impeachment Purposes."

held that a sentencing court "can consider criminal convictions or any other criminal behavior which occurred prior to the sentencing hearing as constituting a previous history of criminal convictions or criminal behavior, regardless of whether the convictions or behavior occurred before or after the criminal conduct under consideration." *State v. John Allen Chapman*, No. 01C01-9604-CC-00137 (Tenn. Crim. App. at Nashville, Sept. 30, 1997) (quoting *State v. Poole*, No. 02C01-9506-CC-00178 (Tenn. Crim. App. at Jackson, Jan. 31, 1996), *aff'd*, 945 S.W.2d 93 (Tenn. 1997)); *see also State v. Jordan*, 116 S.W.3d 8, 24 (Tenn. Crim. App. 2003). Such past criminal behavior on the part of the Appellant adequately supports application of enhancement factor (1) to all convictions.

With regard to contested enhancement factor (2), the Appellants were leaders in the commission of the offenses,

we find that the proof in the record supports its application.

At the sentencing hearing, the trial court observed,

> [T]he facts in this case are pretty overwhelming in the sense of we have individuals who decided that they were going to come to Nashville, Tennessee. They came here in order to rob and to steal . . . Rolex watches, and they did a very methodical approach, renting a hotel room at the Howard Johnson's, and the testimony from that was that clearly there were two people that kept coming up to the registration, one of which was Mr. Guartos and is the one who spoke English whereas the other individual didn't.
>
> There they arm themselves, clearly left behind a box of ammunition with Mr. Londono's fingerprint on it, and there they proceeded to go to the Green Hills Mall where they staked that out the day before. . . . They were . . . waiting for the individuals to come out with the watches and there they committed the crime and then sped off, and actually this crime, the way it was planned out so methodical, probably would not have been solved if it hadn't been for the lady driving down the Interstate.

In weighing this factor, the trial court stated, this factor "is going to be considered but the wieght is not that great[.]" Both Appellants challenge the application of this factor. Gomez argues that he was convicted of facilitation, and "the

very definition of facilitation would negate a finding that he could have been a leader in the offense." Londono contends that application of this factor was improper because "the record is void of any testimony that places him in any sort of leadership position." First, a trial court may apply an enhancement factor based on facts underlying an offense for which the defendant has been acquitted, so long as the facts have been established in the record by a preponderance of the evidence. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2003). Second, this court has held that "enhancement for being a leader in the commission of an offense does not require that the Appellant be the sole leader but only that he be 'a' leader" in the commission of the offense. *State v. Hicks*, 868 S.W.2d 729, 731 (Tenn. Crim. App. 1993) (citation omitted). We agree with the finding of the trial court that, based upon the fingerprint evidence, the testimony at trial, and the methodical nature of the crime, the Appellants

were leaders in the commission of these offenses. Accordingly, we find the trial court's application of enhancement factor (2) to all of the Appellants' convictions was proper.

Finally, the trial court applied factor (9) only to the Appellants' convictions for facilitation of first degree felony murder. Gomez contends that "there was no proof as to who possessed or fired a weapon." Londono appears to be arguing that, because they were only convicted of facilitation, their sentences cannot be enhanced based upon this factor as the jury rejected a theory of criminal responsibility. The underlying felony in this case is the robbery of Rogers. Robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a). Thus, the use of a firearm is not an essential element of robbery. However, while there is no question that a firearm was

employed during the commission of the offense, there is no evidence to connect the firearm to either Appellant. We cannot conclude that this enhancement factor can be applied vicariously under the facts presented. *See State v. Johnny Wayne Harris and Gary L. (Jake) Harris*, No. 03C01-9507-CC-00202 (Tenn. Crim. App. At Knoxville, July 19, 1996). Accordingly, enhancement factor (9) does not apply to the Appellants' convictions for facilitation of first degree felony murder.

When there are enhancement factors and no mitigating factors, there is no presumptive sentence and the court may sentence above the minimum in the range. Tenn. Code. Ann. § 40-35-210(d). The weight to be afforded an existing factor is left to the trial court's discretion so long as the court complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. *State v. Boggs*, 932 S.W.2d 467, 475-76 (Tenn.

Crim. App. 1996). The weight to be afforded mitigating and enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved. *Id.* at 476; *see also State v. Marshall*, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993). Enhancement factors (1) and (2) are of particular weight in this case. Under these circumstances, the trial court was justified in imposing the maximum sentence for each conviction.

B. Consecutive Sentencing

In its sentencing decision, the trial court imposed consecutive sentences with regard to each Appellant. Concerning Gomez, the trial court reasoned in part as follows:

> I am . . . going to find that he is a dangerous offender, and that the behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high.
>
> He is also, and if I find that factor, in order to use consecutive sentences, I have to determine that the

> aggregate term reasonably relates to the severity of the offenses and it's necessary in order to protect the public from further serious criminal conduct by the defendant.
>
> Well, clearly, after these events, Mr. Gomez goes and is involved in another major theft for which he has now been convicted in Federal Court for that, so clearly, the aggregate sentence must be as great as possible in order to protect the public from further serious criminal conduct. This is a horrible crime that occurred in this community for which individuals decided to come here and do it. It is not a crime for which it was spur of the moment or otherwise, so I'm going to find by definition that he is a dangerous offender and given the history that it is a justly deserved sentence under the circumstances pursuant to Wilkerson, so I am going to [order] all sentences consecutive.

Gomez argues that consecutive sentencing was error because (1) the circumstances surrounding the offenses in all counts, apart from those inherent in the offenses themselves, were not aggravated, (2) the aggregate length of the sentence does not reasonably relate to his convictions, and (3) it is not necessary to protect the public from future criminal activity by the Appellant. Furthermore, he contends, citing *State v.*

Massey, 757 S.W.2d 350, 353 (Tenn. Crim. App. 1986), that consecutive sentencing is inappropriate "for 'episodic offenses,' *i.e.*, one criminal act involving multiple victims, or multiple offenses committed simultaneously or serially against a single victim. The offenses for which the trial court imposed consecutive sentences involves (sic) one victim and were clearly part of a single criminal episode."

Regarding Londono, the trial court imposed consecutive sentences and reasoned as follows:

> [H]e is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. Looking at Wilkerson, in order to determine the appropriate sentence, I have to determine that the aggregate term reasonably relates to the severity of the offenses.
>
> Again, this was a horrible crime for which two security guards doing their job were robbed of seven-hundred-fifty-thousand dollars ($750,000.00) worth of Rolex watches in sort of an ambush situation, and necessary in order to protect the public from further serious criminal conduct by the defendant. He has since been convicted of manslaughter and a theft involving a large number of diamonds.

> All that indicates that Mr. Londono needs the maximum sentence in this case, so all sentences are going to run . . . consecutive to each other, consecutive to his Federal sentence and consecutive to his Texas sentence[.] . . .

Londono contends that this decision was error because "in order to facilitate all of the results he would necessarily have had to conspire with the others and therefore the offenses are inseparable and therefore all of the conduct merges into one act for which he should have received concurrent sentences."

Tennessee Code Annotated § 40-35-115(b)(4) (2003) provides that the sentencing court may order sentences to run consecutively if the court finds by a preponderance of the evidence that "the defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high[.]" If a defendant is found to be a dangerous offender, the court must also find that the aggregate sentence is reasonably related to the severity of the

offenses and is necessary to protect the public from further criminal activity of the offender. *State v. Wilkerson*, 905 S.W.2d 933, 936-38 (Tenn. 1995); *see also State v. Lane*, 3 S.W.3d 456 (Tenn. 1999) (holding *Wilkerson* factors were limited to sentencing of "dangerous offenders"). Moreover, in determining whether the sentencing court providently exercised its discretion, "the overriding concern" is the fairness of the resulting sentence under all the circumstances. *State v. Sullivan*, No. M1999-02547-CCA-R3-CD (Tenn. Crim. App. at Nashville, Oct. 13, 2000); *see generally Gray v. State*, 538 S.W.2d 391 (Tenn. 1976).

The focus is "upon the presence of aggravating circumstances" surrounding the crime or crimes for which a defendant is on trial. *Gray*, 538 S.W.2d at 393. We find that, contrary to the assertions of Gomez, *State v. Massey* is not controlling. In *Massey* the court observed that a criminal episode, involving non-aggravated crimes, may become

aggravated by the number of crimes committed or the number of victims involved. *Massey*, 757 S.W.2d at 353. However, in the present case, the crimes for which the Appellants were convicted are themselves aggravated.

The following aggravated circumstances exist. The Appellants are from Miami and traveled to Nashville specifically for the purpose of committing this robbery. As the trial court noted:

> They did a very methodical approach, renting a hotel room at the Howard Johnson's. . . . There they arm themselves, clearly left behind a box of ammunition with Mr. Londono's fingerprint on it, and there they proceeded to go to the Green Hills Mall where they staked that out the day before. . . . They were . . . waiting for the individuals to come out with the watches and there they committed the crime and then sped off[.]

This was an "ambush situation." They quickly knocked Nagele unconscious and stole his weapon. Then, they executed Rogers. Additionally, after the commission of this

robbery, both Appellants were involved in a diamond theft in Texas.

Sentencing is inescapably a human process that neither can nor should be reduced to a set of fixed and mechanical rules. *Wilkerson*, 905 S.W.2d at 938. The trial court imposed respective consecutive sentences for an effective forty-nine-year sentence. Upon *de novo* review, we conclude that the imposition of consecutive sentences for each Appellant was appropriate based upon their classifications as dangerous offenders. Furthermore, the aggregate sentence imposed is reasonably related to the severity of the offenses and is necessary to protect the public from further criminal acts by the Appellants. Accordingly, the Appellants' sentencing issues are without merit.

CONCLUSION

Based upon the foregoing, we conclude that the issues raised on appeal are without merit. The trial court properly

admitted (1) Deborah Sloan's out-of-court and in-court identification of both Appellants, (2) testimony concerning $19,600 found in Gomez's apartment, (3) the statements of Co-defendant Bryant Guartos, and (4) the statements of the victim Rogers as either an excited utterance or a dying declaration. The evidence was sufficient to sustain the Appellants' convictions. We further conclude that the Appellants' sentences were not excessive as to length and that consecutive sentencing was appropriate. Accordingly, the judgments of conviction and resulting sentences are affirmed.

/s/
DAVID G. HAYES, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
	)	
v.	)	**DAVIDSON COUNTY**
	)	**NO. M2002-01209-SC-R11-CD**
	)	
EDWIN GOMEZ and	)	
JONATHAN S. LONDONO,	)	
	)	
Appellants.	)	

[STATE'S] PETITION FOR REHEARING

The State of Tennessee requests a rehearing in this case with respect to Part III.C. of the majority opinion of the Court. Slip op at 19-27. In concluding that the defendants' sentences were not imposed in violation of the Sixth Amendment, the Court determined that

> [t]he Reform Act authorizes a discretionary, non-mandatory sentencing procedure and requires judges to consider the principles of sentencing and to engage in qualitative analysis of enhancement and mitigating factors. The Reform Act does not include a formula,

> a grid, or any other mechanical process. It instead sets out broad sentencing principles, enhancement and mitigating factors, and a presumptive sentence, all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature. Under the Reform Act, the finding of an enhancement factor does not mandate an increased sentence. The Reform Act does not provide a system which requires or even allows judicial power to "infringe upon the province of the jury." Blakely *[v. Washington]*, 124 S.Ct. at 2540.

Slip op at 27. In reaching this determination however, the Court has overlooked or misapprehended a material proposition of law. See Rule 39(a), T.R.A.P.

The Court places much emphasis on the fact that, under the Reform Act, "the finding of an enhancement factor does not mandate an increased sentence" Slip op. at 27. That is true enough, in that a court is always free to sentence a defendant at or below the presumptive minimum sentence, even when an enhancement factor is applicable. But that was equally true of the Washington guidelines under review in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the New Jersey statute at

issue in *Apprendi v. New Jersey*, 530 U.S. 466(2000), the statute involved in *Jones v. United States*, 526 U.S. 227 (1999), and Arizona's capital sentencing statute under scrutiny in *Ring v. Arizona*, 536 U.S. 584 (2002), all of which were found to violate the Sixth Amendment.

The critical inquiry under the Sixth Amendment is *not* whether the finding of an enhancement factor mandates an increased sentence above the presumptive minimum, but whether, under the applicable statutes, the judge can increase the sentence above the presumptive minimum only by finding additional facts. "Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 124 S.Ct. at 2538, n.8. It is as plain as a pikestaff that a Tennessee judge has no authority to impose a sentence above the presumptive minimum – the sentence authorized by the jury verdict alone – unless an enhancement factor is found.

See Tenn, Code Ann. § 40-35-210 (c), (d). Except for the fact of a prior conviction or a fact stipulated by the defendant, *Apprendi* holds that any such fact must be found by a jury beyond a reasonable doubt. 530 U.S at 490.

The decision in *United States v. Booker*, 125 S.Ct. 738 (2005), does not alter the conclusion that Tennessee's scheme violates the *Apprendi* rule. While *Booker* acknowledges that sentencing guidelines that are "merely advisory provisions" and not "mandatory and binding on all judges" do not implicate the Sixth Amendment, *Booker*, 125 S.Ct. at 750, it is clear from the context in *Booker* that the Court regarded the federal sentencing guidelines to be mandatory and binding because the only means of imposing an upward departure from the base range sentence was through the application of the guidelines, which in turn required findings of fact beyond the facts necessarily found by the jury verdict. In other words, an upward departure could only be reached by following the

guidelines. It was in that sense that the Court viewed the guidelines as mandatory and binding; it was not because they required a particular sentence. See *Booker*, 125 S.Ct. at 750-51.

The same is true of Tennessee's statutory scheme, which authorizes a sentence above the presumptive minimum *only* when enhancement factors are found. Tenn. Code Ann. § 40-35-210(c), (d). On the other hand, an example of an advisory non-mandatory scheme is the proposal recommended by the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing. Under that proposal, the statutory presumptive minimum sentence is eliminated, the enhancement factors are merely advisory, and the trial judge is free to impose any sentence within the range.

As this Court correctly determined, the defendants failed to preserve properly their constitutional claims of error and failed to carry their burden of demonstrating plain error. For

the reasons stated in the States principal brief, *see* pp. 24-25, the defendants failed to satisfy the requirements of the plain-error test because they failed to demonstrate that consideration of the error is "necessary to do substantial justice."

CONCLUSION

Rehearing should be granted and the judgment affirmed for the reasons stated herein and in the State's principal and supplemental briefs.

Respectfully submitted,

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RELEVANT TENNESSEE STATUTES

Title 40. Criminal Procedure, Chapter 35. Criminal Sentencing Reform Act Of 1989

§ 40-35-101. Short title

This chapter shall be known and may be cited as the "Tennessee Criminal Sentencing Reform Act of 1989."

§ 40-35-102. Purpose and intent

The foremost purpose of this chapter is to promote justice, as manifested by § 40-35-103. In so doing, the following principles are hereby adopted:

(1) Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense;

(2) This chapter is to assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions;

(3) Punishment shall be imposed to prevent crime and promote respect for the law by:

(A) Providing an effective general deterrent to those likely to violate the criminal laws of this state;

(B) Restraining defendants with a lengthy history of criminal conduct;

(C) Encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendants; and

(D) Encouraging restitution to victims where appropriate;

(4) Sentencing should exclude all considerations respecting race, gender, creed, religion, national origin and social status of the individual;

(5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted

felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and

(6) A defendant who does not fall within the parameters of subdivision (5) and who is an especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.

§ 40-35-103. Principles

To implement the purposes of this chapter, the following principles apply:

(1) Sentences involving confinement should be based on the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant;

(2) The sentence imposed should be no greater than that deserved for the offense committed;

(3) Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided;

(4) The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed;

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. The length of a term of probation may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence; and

(6) Trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation and/or community service.

§ 40-35-110. Classification

(a) Felonies are classified, for the purpose of sentencing, into five (5) categories:

(1) Class A felonies;

(2) Class B felonies;

(3) Class C felonies;

(4) Class D felonies; and

(5) Class E felonies.

...

§ 40-35-113. Mitigating factors

If appropriate for the offense, mitigating factors may include, but are not limited to:

(1) The defendant's criminal conduct neither caused nor threatened serious bodily injury;

(2) The defendant acted under strong provocation;

(3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(4) The defendant played a minor role in the commission of the offense;

(5) Before detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal

conduct for the damage or injury the victim sustained;

(6) The defendant, because of youth or old age, lacked substantial judgment in committing the offense;

(7) The defendant was motivated by a desire to provide necessities for the defendant's family or the defendant's self;

(8) The defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense; however, the voluntary use of intoxicants does not fall within the purview of this factor;

(9) The defendant assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses;

(10) The defendant assisted the authorities in locating or recovering any property or person involved in the crime;

(11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that

it is unlikely that a sustained intent to violate the law motivated the criminal conduct;

(12) The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a defense to the crime; or

(13) Any other factor consistent with the purposes of this chapter.

§ 40-35-114. Enhancement factors

If appropriate for the offense, enhancement factors, if not themselves essential elements of the offense as charged in the indictment, may include:

(1) The offense was an act of terrorism, or was related to an act of terrorism;

(2) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(3) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;

(4) The offense involved more than one (1) victim;

(5) A victim of the offense was particularly vulnerable because of age or physical or mental disability, including, but not limited to, a situation where the defendant delivered or sold a controlled substance to a minor within one thousand feet (1,000') of a public playground, public swimming pool, youth center, video arcade, low income housing project, or church;

(6) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(7) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

(8) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

(9) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

(10) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;

(11) The defendant had no hesitation about committing a crime when the risk to human life was high;

(12) The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury;

(13) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the

actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim;

(14) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:

(A) Bail, if the defendant is ultimately convicted of such prior felony;(B) Parole;(C) Probation;(D) Work release; or (E) Any other type of release into the community under the direct or indirect supervision of the department of correction or local governmental authority;

(15) The felony was committed on escape status or while incarcerated for a felony conviction;

(16) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense;

(17) The crime was committed under circumstances under which the potential for bodily injury to a victim was great;

(18) The defendant committed the offense while on school property;

(19) A victim, under § 39-15-402, suffered permanent impairment of either physical or mental functions as a result of the abuse inflicted;

(20) If the lack of immediate medical treatment would have probably resulted in the death of the victim under § 39-15-402;

(21) The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult;

(22) The defendant, who was provided with court-appointed counsel, willfully failed to pay the administrative fee assessed pursuant to § 40-14- 103(b)(1); or

(23) The defendant intentionally selects the person against

whom the crime is committed or selects the property that is damaged or otherwise affected by the crime in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person or of the owner or occupant of that property. However, this subsection should not be construed so as to permit the enhancement of a sexual offense on the basis of gender selection alone.

§ 40-35-201. Determination of guilt; sentencing hearings; separate trials

(a) In all contested criminal cases, the issue of guilt or innocence is submitted to the trier of fact for a verdict on that issue alone. If the defendant is found or pleads guilty, sentence shall be set in accordance with this chapter in a separate sentencing hearing. Nothing in this chapter shall be construed to deprive a defendant of a right to a jury trial as to

the defendant's guilt or innocence pursuant to Rule 23 of the Tennessee Rules of Criminal Procedure and appropriate provisions of the constitution of the United States or of Tennessee.

...

§ 40-35-202. Enhancement or mitigation; statements of district attorney or defendant

(a) If the district attorney general believes that a defendant should be sentenced as a multiple, persistent or career offender, the district attorney general shall file a statement thereof with the court and defense counsel not less than ten (10) days before trial or acceptance of a guilty plea; provided, that notice may be waived by the defendant in writing with the consent of the district attorney general and the court accepting the plea. Such statement, which shall not be made known to the jury determining the guilt or innocence

of the defendant on the primary offense, must set forth the nature of the prior felony convictions, the dates of the convictions and the identity of the courts of the convictions. The original or certified copy of the court record of any prior felony conviction, bearing the same name as that by which the defendant is charged in the primary offense, is prima facie evidence that the defendant named therein is the same as the defendant before the court, and is prima facie evidence of the facts set out therein.

(b) In all cases following a finding of guilt, the court may require that:

(1) The district attorney general file a statement with the court setting forth any enhancement or mitigating factors the district attorney general believes should be considered by the court; and

(2) The defendant file a statement with the court setting forth all mitigating factors known to the defendant and

indicating any mitigating factors the defendant believes should be considered by the court.

§ 40-35-203. Imposition of sentence

(a) Except as provided in subsection (c) and with respect to fines as provided in § 40-35-301, sentences in felony and misdemeanor cases shall be imposed by the court. Upon a verdict or plea of guilty, the court shall set and conduct a sentencing hearing except as provided in subsection (b). Evidence may, but need not, be presented by both the defendant and the district attorney general on any matter relevant to the issue of sentencing. The sentencing hearing may occur immediately after guilt is determined, subject to the rights of the parties to postpone the hearing under § 40-35-209(a).

(b) Where the sentence is agreed upon by the district attorney general and the defendant and accepted by the court,

the court may immediately impose sentence as provided in § 40-35-205(d), and no specific sentencing hearing or presentence reports shall be required. The judge may, in the judge's discretion, direct that a complete presentence report be prepared. No defendant sentenced to the custody of the department of correction shall be committed or conveyed to the department unaccompanied by the completed presentence report or investigation and report required by §40-35-209(d)(1). Furthermore, a presentence report or investigation and report shall be prepared on all defendants sentenced to a period of continuous confinement of one (1) year or greater in a local jail or workhouse. This requirement shall not be cause for delay in conveying the defendant to the local institution to which the defendant has been committed. There shall be a presentence report and hearing on any issue of sentencing not agreed upon by the parties and accepted by the court.

(c) If a capital offense is charged and the jury returns a verdict where death is a possibility, the jury shall fix the punishment in a separate sentencing hearing as otherwise provided by law, unless the jury is waived as to punishment.

(d) If the trial judge who presided at the trial on the merits is unavailable because of death, resignation, retirement, ill health or loss of jurisdiction, another judge appointed by the chief justice of the Tennessee supreme court may impose the sentence.

(e) If the criminal offense for which the defendant is charged carries an enhanced punishment for a second or subsequent violation of the same offense, the indictment in a separate count shall specify and charge such fact. If the defendant is convicted of the offense, then the jury must find that beyond a reasonable doubt the defendant has been previously convicted the requisite number of times for the same offense. Upon such finding, the defendant shall be

subject to the authorized terms of imprisonment for the felonies and misdemeanors as set forth in § 40-35-111.

§ 40-35-210. Imposition of sentence; evidence; presumptive sentences

(a) At the conclusion of the sentencing hearing, the court shall first determine the appropriate range of sentence.

(b) To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

(1) The evidence, if any, received at the trial and the sentencing hearing;

(2) The presentence report;

(3) The principles of sentencing and arguments as to sentencing alternatives;

(4) The nature and characteristics of the criminal conduct involved;

(5) Evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and

(6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

(c) The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. The presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors.

(d) Should there be enhancement but no mitigating factors for a Class B, C, D or E felony, then the court may set the sentence above the minimum in that range but still within the range. Should there be enhancement but no mitigating factors for a Class A felony, then the court shall set the sentence at or above the midpoint of the range. Should there be mitigating but no enhancement factors for a Class A felony, then the

court shall set the sentence at or below the midpoint of the range.

(e) Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. Should there be enhancement and mitigating factors for a Class A felony, the court must start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors.

(f) Whenever the court imposes a sentence, it shall place on the record either orally or in writing what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209.

(g) A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, and, the record of prior felony convictions filed by the district attorney general with the court as required by § 40-35-202(a).

(h)(1) Upon sentencing a defendant to the department of correction or to a local jail or workhouse for a period of more than two (2) years, the judge shall announce in open court that information explaining the sentence just imposed is available to anyone upon request. The information explaining the sentence shall consist of a copy of the completed uniform judgment document required by Rule 17 of the Rules of the Supreme Court and § 40-35-209(e), and an accompanying document that shall contain the following information:

(A) A statement explaining that an estimate of the number of years of a felony sentence that a defendant is required to serve before being first eligible for release on parole can be calculated by determining the defendant's range

and release eligibility percentage and then applying that percentage to the defendant's sentence. An example is a defendant sentenced to ten (10) years in the department of correction as a persistent range III offender with a release eligibility percentage of 45%. That means the defendant must serve forty-five percent (45%) of ten (10) years or four and a half (4 1/2) years before being first eligible for release on parole. This four and a half (4 1/2) year minimum length of sentence service does not include a defendant's sentence reduction credits or the possible effect of prison overcrowding which are discussed in subdivisions (h)(1)(C) and (h)(1)(E), respectively;

(B) A statement that whether a defendant is actually released from incarceration on the date when such defendant is first eligible for release is a discretionary decision made by the board of probation and parole based upon many factors

and that such board has the authority to require the defendant to serve the entire sentence imposed by the court;

(C) A statement that pursuant to § 41-21-236, a defendant, after incarceration, may earn sentence reduction credits of up to eight (8) days per month for good institutional behavior and up to eight (8) days per month for satisfactory program performance for a maximum total of sixteen (16) days per month;

(D) A statement that the actual number of such reduction credits for good behavior and program performance that a defendant earns depends upon the defendant's conduct while incarcerated and that the department may remove sentence credits previously awarded for certain disciplinary infractions; and

(E) A statement that during certain specified times of prison overcrowding the governor may, pursuant to § 41-1-504, direct the board of probation and parole to grant early

parole to a sufficient number of certain types of inmates to reduce the overcrowding.

(2) The failure of a judge to provide the sentence explanation information upon request as required by this subsection or the fact that the sentence explanation information provided may be inaccurate, incomplete or erroneous shall not be used by a defendant in a criminal case as a ground for appeal, new trial, post-conviction relief or habeas corpus, nor shall it be construed to set aside, reverse, vacate, or void a finding of guilt, an acceptance of a plea of guilty or the sentence imposed in any criminal case.

§ 40-35-211. Imposition of sentence; determinate sentences

In fixing a sentence for a felony or misdemeanor, the court shall impose a specific sentence length for each offense: (1) Specific sentences for a felony shall be for a term of years

or months or life, if the defendant is sentenced to the department of correction; or a specific term of years, months or days if the defendant is sentenced for a felony to any local jail or workhouse. Specific sentences for a misdemeanor are for a specific number of months or days or hours or any combination thereof. There are no indeterminate sentences. Sentences for all felonies and misdemeanors are determinate in nature, and the defendant is responsible for the entire sentence undiminished by sentence credits of any sort, except for credits authorized by § 40-23-101 relative to pretrial jail credit, or §§ 33-5-406 and 33-7-102 relative to mental examinations and treatment, and prisoner sentence reduction credits authorized by § 41-21-236.

(2) If the minimum punishment for any offense is imprisonment in the penitentiary for one (1) year, but in the opinion of the court the offense merits a lesser punishment, the defendant may be sentenced to the local jail or workhouse

for any period less than one (1) year, except as otherwise provided.

(3) If a defendant is convicted of an offense designated as a felony but the court imposes a sentence of less than one (1) year in the local jail or workhouse, such defendant shall be considered a felon but shall be sentenced as in the case of a misdemeanor, and, therefore, shall be entitled to sentence credits under § 41-2-111. Upon such defendant becoming eligible for work release, furlough, trusty status or related rehabilitative programs as specified in § 40-35-302(d), the defendant may be placed in such programs by the sheriff or administrative authority having jurisdiction over the local jail or workhouse.

§ 40-35-401. Defendants

(a) The defendant in a criminal case may appeal from the length, range or the manner of service of the sentence imposed by the sentencing court. The defendant may also

appeal the imposition of consecutive sentences. An appeal pursuant to this section shall be taken within the same time and in the same manner as other appeals in criminal cases. If there is an appeal of the conviction, the appeal of the sentence shall be taken at the same time. There is no appellate review of the sentence in a post-conviction or habeas corpus proceeding.

(b) An appeal from a sentence may be on one (1) or more of the following grounds:

(1) The sentence was not imposed in accordance with this chapter; or

(2) The enhancement and mitigating factors were not weighed properly, and the sentence is excessive under the sentencing considerations set out in § 40- 35-103.

(c) If a sentence is appealed, the appellate court may:

(1) Dismiss the appeal;

(2) Affirm, reduce, vacate or set aside the sentence imposed;

(3) Remand the case or direct the entry of an

appropriate sentence or order; or

(4) Direct any further proceedings appropriate or required under the circumstances.

(d) When reviewing sentencing issues raised pursuant to subsection (a), including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.

TENNESSEE SENTENCING GRID CHART

FELONY CLASS	MITIGATED (0 priors)	STANDARD Range I (0-1 priors)	MULTIPLE Range II (2-4 priors)	PERSISTENT Range III (5+ priors)	CAREER
A 15 - 60 years RED % RED years	13.5 years (20%) (2.7 years)	15 -25 years (30%) (4.5 - 7.5 years)	25 - 40 years (35%) (8.8 - 14 years)	40 - 60 years (45%) (18 27 years)	60 years (60%) (36 years)
B 8 - 30 years RED % RED years	7.2 years (20%) (1.4 years)	8 - 12 years (30%) (2.4 - 3.6 years)	12 - 20 years (35%) (4.2 - 7 years)	20 - 30 years (45%) (9 13.5 years)	30 years (60%) (9 years)
C 3 - 15 years RED % RED years	2.7 years (20%) (.5 years)	3 - 6 years (30%) (.9 - 1.8 years)	6 - 10 years (35%) (2.1 - 3.5 years)	10 - 15 years (45%) (4.5 - 6.8 years)	15 years (60%) (9 years)
D 2 -12 years RED % RED years	1.8 years (20%) (.4 years)	2 - 4 years (30%) (.6 - 1.2 years)	4 - 8 years (35%) (1.4 - 2.8 years)	8 - 12 years (45%) (3.6 - 5.4 years)	12 years (60%) (7.2 years)
E 1 - 6 years RED % RED years	.9 years (20%) (.2 years)	1 - 2 years (30%) (.3 - .6 years)	2 - 4 years (35%) (.7 - 1.4 years)	4 - 6 years (45%) (1.8 - 2.7 years)	6 years (60%) (3.6 years)

NOTE: First Degree Murder excluded from chart. Sentencing solely according to First Degree Murder statute. RED = Release Eligibility Date. Presumptive sentence = minimum in range. (Except for Class A = middle of range). Crimes designated "np" on reverse are ineligible for parole

MAXIMUM FINES					
FELONY	A - $50,000	B - $25,000	C - $10,000	D - $5,000	E - $3,000
MISDEMEANOR	A - $ 2,500	B - $ 500	C - $ 50	(Drug fines are special)	

County sentencing contracts available in many jurisdictions (Shelby County - if 6 years or less)

RANGE CALCULATION*				
Especially Mitigated	Range I - Standard	Range II - Multiple	Range III - Persistent	Career
0 priors, 10% reduction in sentence and/or RED	0 - 1 prior, depends upon class of prior conviction	2 - 4 priors in class, higher, or 2 down, or 1 prior A, if class is A or B	5 or more in class, higher, or 2 down, or 2 prior A's, or combination of 3 A's and B's if class is A or B	If class is A, B or C, any combination of 6 A's, B's or C's, or if class is A or B, 3 A's or combination of 4 A's and B's or if class is D or E, 6 of any combination
* Check single course of conduct				

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